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OW .U.K. :

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HOUSE OF LORDS

CASES,

ON

APPEALS AND WRITS OF ERROR,

AND

Claims of Peerage,

DURING THE SESSIONS

1860, 1861 AND 1862.

BY

CHARLES CLARK, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

(By Appointment of the House of Lords.)

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1863.

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OW .U.K. :

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ERRATA.

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293. Seventeenth line from the top, for *ustitiam* read *justitiam*.
384. Sixth line from the bottom, for *open to*, read *only open to*.
556. Thirteenth line from the bottom, after the words *contained merchandise*, insert *of which the Defendant had not notice*.
711. First line of head note, for *Barister* read *Barrister*.
- Twentieth line from the top, for *these* read *the*.
- ✓

C A S E S

IN THE

HOUSE OF LORDS.

JONATHAN BULLOCK and others - - Appellants.
CHARLOTTE DOROTHY DOWNES and others, Respondents.

1860.
 {
 June 7, 8.
 July 24.

A. D., after specific bequests to different members of his family, gave the residue to three persons, in trust to pay the dividends to his son for life, and after the son's decease to pay to any widow of the son (who was not then married) an annuity of 600 £. for life, and the residue to his son's children, and, in case there should not be any child of the son "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would by virtue of the Statutes of Distributions of Intestates' Effects have become, and been *then* entitled thereto, in case I had died intestate." At **A. D.**'s death, he left the son and four daughters him surviving. The son married, enjoyed the dividends of the residue during life, and died without ever having had a child :

Will.
Next of Kin.
Statute of
Distributions.
"Then."
Life Interest.
Joint
Tenancy.
Residue.
Acquiescence.
Statute of
Limitations.
Trust.

HELD that the word *then*, even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them ; that the persons entitled were to be ascertained at the death of the testator ; that the son was one of those persons, and that his right as one of the next of kin was not affected by the previous gift of a life interest in the whole of the residue, so that, on the death of the son without issue, the residue became divisible into five shares, of which his personal representatives took one, and his sisters the other four :

1860.
 {
 BULLOCK
 v.
 DOWNES.

HELD also (*dub.* Lord *Wensleydale*), that these shares were not taken in joint tenancy, for where there is a bequest to persons who would have been entitled under the Statute of Distributions, they take as if there had been an intestacy.

During the life of the son, and till the time of filing the bill, which was 24 years after his death, all the members of the family had believed, and had done many acts on the belief (not the result of legal discussion, but a mere family assumption) that the son was not entitled to a share of the residue as one of the next of kin, but that his title to the property expired with his life estate :

HELD that this was not such an acquiescence in a family arrangement as prevented the son's personal representatives from enforcing their claim.

HELD also, that the length of time was not a bar under the Statute of Limitations, for that the will created a trust.

Semble the 40th Section of 3 & 4 *Will.* 4, c. 27, applies to legacies charged on land.

THE Rev. *Andrew Downes*, of *Witham*, in the county of *Essex*, made his will and codicil, dated respectively 19 *June* and 2 *July* 1815, and thereby, after making specific provision by gift and annuity for different members of his family, gave all the residue of his estate and effects to the Respondent, *Jonathan Bullock*, and two other persons, *John Bullock* and *Thomas Wigglesworth* (both of whom have since died), upon the following, among other trusts: to pay the interest of the residuary property to his son, *Robert Downes*, for life, and, after the son's decease, to the son's widow (if any), an annuity not exceeding 600 *l.*, as the son should appoint, and to the son's children (who however took no vested interests at birth); and the will then went on, "and in case there shall not be any child or children of my said son *Robert Downes*, who, under the trusts aforesaid, should obtain a vested interest in the said trust monies, &c., then do and shall stand and be possessed of the said trust monies, &c., and the interest, dividends, and annual produce thereof, in trust for, and to pay, assign, and transfer the same monies, &c. unto such person or

persons of the blood or next of kin of me the said *Andrew Downes* as would, by virtue of the Statutes of Distribution of Intestates' Effects, have become and been *then* entitled thereto in case I had died intestate."

1860.
BULLOCK
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The testator died 19 *October* 1820, leaving a widow and five children, the son *Robert* and four daughters. The son married in *May* 1821, and, under the powers given him in the will, settled an annuity of 600 *l.* on his widow. The son received the interest of the residuary property during his life. He and all the rest of the family, apparently on the opinion of Mr. *Wiglesworth*, acted on the assumption that, in case of his death without children, the residuary property (subject to the 600 *l.* annuity) would become vested in the testator's four daughters. On this assumption, his mother advanced him sums amounting to 7,500 *l.*, and made a settlement on him, his executors, &c. of an additional sum. The son died in *February* 1832, never having had a child. He had previously made his will, appointing his wife his universal legatee, and, with two other persons, his executrix and executors. After his death, the executors of the father went on upon the same assumption as before, and paid the dividends of the residuary property to and among the four daughters, and transferred to them and their children some portions of the capital. In 1856 the son's widow and his executors filed a bill against the surviving executor of *Andrew Downes* and the other necessary parties, praying that the trusts of the will of *Andrew Downes* might be carried into effect, that accounts might be taken, and the estate applied in a due course of administration, and that the son's widow might be declared entitled to one-fifth part of the residue of the testator's estate. Answers were put in, and, among other things, the benefit of the Statute of Limitations was claimed. The cause was

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heard before the *Master of the Rolls*, who, by a decree, made on the 1st *May* 1858 (a), declared that, “on the death of *Robert Downes* without issue, the residuary property became divisible, in equal shares, among the next of kin of the testator, *Andrew Downes*, living at his death,” and that the Plaintiffs, as executrix and executors of *Robert Downes*, were entitled to one-fifth share; and the necessary inquiries and accounts were directed. The appeal was against this decree.

Sir *H. Cairns* and Mr. *Follett* (Mr. *H. W. Busk* was with them) for the Appellants.

The proper construction of this will is, that the gift over can only arise on the death of the son and the failure of the son's issue. The word *then*, as used in this will, refers alone to that time, and, consequently, indicates only, as next of kin of the testator, those who bore that character at the son's death without issue. The most recent decision on this subject, *Wharton v. Barker* (b), where this case itself was cited, is perhaps the most applicable. There a residue was given to two daughters—as to one half, to *Mary*; as to the other, to *Sarah*, with cross-remainders, and in case both should die without issue, “*then* I direct my trustees to pay one-half to the person who shall *then* be considered my next of kin and personal representative, agreeable to the Statute of Distributions; and the other half to the persons who shall *then* be considered the next of kin and personal representative of my late wife, agreeable to the order of the Statute of Distributions.” The two daughters survived the testator; both died without issue. It was held that the persons entitled were to be ascertained at the death of the surviving daughter, although there the statute

(a) 25 Beav. 54.

(b) 4 Kay & Joh. 483.

itself was most distinctly referred to. Nevertheless it was not held there to do more than designate the persons who were to take. It is admitted that the decisions do not appear to be uniform, but, when examined, it will be found that where, as in the present case, the expression used implies a future time, the objects of the gift over must be ascertained at the failure of the life estate, *Jones v. Colbeck* (c), *Miller v. Eaton* (d), *Clapton v. Bulmer* (e), *Long v. Blackall* (f), *Holloway v. Holloway* (g), *Briden v. Hewlett* (h), *Butler v. Bushnell* (i), *Withy v. Mangles* (j). *Holloway v. Radcliffe*, where the distinction between words having a future or a past signification, is strongly remarked on by the *Master of the Rolls* (k). *Gundry v. Penniger* (l), *Cable v. Cable* (m), *Wheeler v. Addams* (n), do not affect this case, for they depend on the particular words of each will.

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But assuming that the son was to be included among those entitled to a share of the residue, as next of kin, the class being ascertained at the death of the testator, and there being no expression to indicate the nature of the interests taken, it is clear that he took, as if all the persons to take had been named in the will, that is as one of five joint tenants, *Richardson v. Richardson* (o), and nothing having been done by him to sever the tenancy, nothing passed on his death to his personal representatives, *Withy v. Mangles*, *Godkin v. Murphy* (p). The testator could not have intended that the person who would take

(c) 8 Ves. 38.

(d) Sir G. Coop. 272.

(e) 5 Myl. & Cr. 108.

(f) 3 Ves. 486.

(g) 5 Ves. 399.

(h) 2 Myl. & K. 90.

(i) 3 Myl. & K. 232.

(j) 10 Clark & Fin. 215.

(k) 23 Beav. 169.

(l) 14 Beav. 94; 1 De G. M. & Gord. 502.

(m) 16 Beav. 507.

(n) 17 Beav. 417.

(o) 14 Sim. 526.

(p) 2 Yo. & Col. C. C. 351.

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under the specific gift, should also take when that gift came to an end, and the gift over was to take effect. He had excluded, by words, his own widow from any contingent benefit of this kind; the reason, of course, being that he had previously provided for her; and in like manner he had previously provided for his son.

Here there has been acquiescence in what was plainly considered as a family arrangement, as is proved by the fact that the mother of *Robert Downes* advanced him money, and made provision for him differently from her other children, in the belief that he would not be entitled to share with them as one of the next of kin; and he himself always acted on the same belief. That which has been so long acted on, namely, from the death of the testator to the filing of the bill, cannot now be disturbed, *Clifton v. Cockburn* (q), *Head v. Godlee* (r), for the court is always reluctant to disturb a family arrangement.

The claim of the son's representatives is also barred by the Statute of Limitations. It has been said that this is a trust; it is not a trust which is protected from the operation of the statute. The statute only exempts from its operation express trusts in land, *Philippo v. Munnings* (s). This is a legacy within the meaning of the statute, for that word has been held to extend to residue or a share of residue.

Mr. *R. Palmer* and Mr. *Selwyn* for the Respondents :

The cases are not difficult to reconcile if their various circumstances are considered; there is not shown here any intention to exclude the tenant for life from the benefit of the residuary gift, but only, should he die without issue,

(q) 3 Myl. & K. 76.

(r) 29 Law J. Ch. 633; 1 Johnst. 536.

(s) 2 Myl. & Cr. 309.

to allow his representatives and those of his sisters, to share it equally in their common character of next of kin. Those cases which appear to exclude the representatives of the tenant for life, were considered by Lord *Langdale* in *Seifferth v. Badham* (*t*), and it is plain that he did not approve of some of them founded upon nice distinctions as to *shall* and *will*, and *should* and *would*. *Jones v. Colbeck* (*u*), is in effect at variance with *Holloway v. Holloway* (*v*), *Urquhart v. Urquhart* (*w*), *Seifferth v. Badham*, *Baldwin v. Rogers* (*x*), *Smith v. Smith* (*y*), *Ware v. Rowland* (*z*), and *Bird v. Luckie* (*a*). Of these, the principle is best stated in *Seifferth v. Badham* (*b*), where the objection relied on by the other side is taken and answered; it is there said, "the brothers and sister of the testator allege, that the testator having intended to give such particular interests as were provided for them by the former clauses of his will, could not intend them to take absolutely under the description of next of kin, or intend, as his next of kin, the same persons upon whose death without issue he directed the property to go over; he must, it is said, have meant the persons who should be his next of kin at the time when the gift over took effect." His Honor having thus fully stated the argument, declined to adopt it, observing that the testator seemed to him to have desired certain events to happen, but failing them, wished that the law should "take its course." *Bradley v. Barlow* (*c*), *Rayner v. Mowbray* (*d*), *Doe d. Garner v. Lawson* (*e*), *Jenkins v. Gower* (*f*), *Cable v.*

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(*t*) 9 Beav. 370.

(*u*) 8 Ves. 38.

(*v*) 5 Ves. 399.

(*w*) 13 Sim. 613.

(*x*) 3 De G. M. & Gord. 649.

(*y*) 13 Sim. 317.

(*z*) 2 Phil. 635.

(*a*) 8 Hare, 301.

(*b*) 9 Beav. 374.

(*c*) 5 Hare, 589.

(*d*) 3 Bro. Ch. C. 234.

(*e*) 3 East, 278.

(*f*) 2 Coll. Ch. C. 537.

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Cable (g), *Starr v. Newberry* (h), all follow the same rule. So does *Wharton v. Barker* (i), where the preceding authorities were reviewed. That general rule can only be prevented from operating by express words showing a different intention; there are no such words here. In *Moss v. Dunlop* (j), though the particular words used in the will seemed to refer to a future time, still Vice-Chancellor *Wood* was of opinion that the ordinary rule which ascertained the next of kin at the death of the testator, ought to be applied.

As to the question of joint tenancy, it is clear that if a person is to become entitled by reference to the Statute of Distribution, he must be entitled as if he had taken under the statute. Distribution must mean tenancy in common. The cases cited on the other side have no application here. *Withy v. Mangles* (k), was the case of a settlement, and there was no reference to the statute. In *Godkin v. Murphy* (l), the Vice-Chancellor merely said that whether there was a joint tenancy at one period or a tenancy in common at another, the widow, under the peculiar circumstances there, was equally excluded, and even as to that expression, the same learned Judge in *Jenkins v. Gower* (m), and *Bird v. Luckie* (n), signified his distrust of the accuracy of what had then fallen from him. *Richardson v. Richardson* (o) was decided entirely on the force of the words "unto and amongst," which are not to be found in this will, and that case is therefore inapplicable to the present. Besides which, that case is irreconcilable with *Mattison v. Tanfield* (p), *Lewis v.*

(g) 16 Beav. 507.

(h) 23 Beav. 436.

(i) 4 Kay & Jo. 483.

(j) 1 Johnst. 490.

(k) 4 Beav. 358; 10 Clark &

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(l) 2 Yo. & Col. C. C. 351.

(m) 2 Coll. 542.

(n) 8 Hare, 307.

(o) 14 Sim. 526.

(p) 3 Beav. 131.

Morris (*q*), *Martin v. Glover* (*r*), *Horn v. Coleman* (*s*), and *Smith v. Palmer* (*t*), all of which establish the rule that the statute not only indicates the persons, but declares the interests; and in *Jacobs v. Jacobs* (*u*), the *Master of the Rolls* held that a gift residue of personalty to heirs meant to next of kin, and that they took as tenants in common.

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Then as to the Statute of Limitations, that does not apply here, for the words create an express trust. This is not a case of a pecuniary legacy, and is therefore not affected by what was said in *Prior v. Horniblow* (*v*), or *Sheppard v. Duke* (*w*), the former of which is doubted in *Adams v. Barry* (*x*), but the construction of the statute is better considered in *Paget v. Foley* (*y*), and *Piggott v. Jefferson* (*z*). In *Philippo v. Munnings* (*a*), an executor had done an act which converted him into a trustee, and so the statute was held not to apply. *Brooksbank v. Smith* (*b*), shows that in equity the discovery of a mistake is the date from which the statute begins to run; and in *Brandon v. Brandon* (*c*), the *Lord Chancellor* expressed an opinion that time would not prevent the Court from doing justice, where the subject matter of a suit still remained in Court, and nothing had been done with respect to its distribution. That principle is applicable here.

Then as to acquiescence. There has not been any family arrangement here; and unless the parties have done acts which show an understanding, and a will exercised upon it, they will not be bound. In *Clifton v.*

(*q*) 19 Beav. 34.

(*r*) 1 Coll. 269.

(*s*) 1 Sm. & Gif. 169.

(*t*) 14 Sim. 525.

(*u*) 16 Beav. 557.

(*v*) 2 Yo. & Col. Ex. 200.

(*w*) 9 Sim. 567.

(*x*) 2 Coll. 290.

(*y*) 2 Bing. N. C. 679.

(*z*) 12 Sim. 26.

(*a*) 2 Myl. & Cr. 309.

(*b*) 2 Yo. & Col. Ex. 58.

(*c*) 7 De G. M. & Gord. 369.

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Cockburn (*d*), *Head v. Godlee* (*e*), *Harvey v. Cooke* (*f*),
Lawton v. Champion (*g*), these circumstances did occur.

Mr. *Follett* replied :

The intention of the testator is clearly shown in this case, and ought to prevail over any merely technical construction of words. It has been said, that this ought to be treated as if the testator had said, in certain events it will be the same as an intestacy, and then I intend the law to take its course. But that argument is ill founded. He intended to exclude his own wife, for he leaves the residue to those of his blood, so that it is plain he did not mean that the law should "take its course." Then there is a careful provision for the son out of that fund, which, on the son's issue failing, is to go over: there is an exclusion of certain people (his own widow, for instance, who, like his son, was in other ways provided for), and then words of futurity are employed which describe a time at which alone the gift over is to take effect, and it is to do so in favour of persons who are "then entitled" as his next of kin. The testator did not think that anybody would take an interest in the residue till the son and his children had been removed out of the way; but when they were gone he meant that the daughters should be substituted for him.

By the reference to the statute the testator only intended to describe who were to take; he had no idea that he thereby settled the amount or character of their interest. The persons were designated; they were the persons entitled at his son's death. In the cases of *Mattison v. Tanfield*, and others of that class, there were words such as "according to the statute," and "under

(*d*) 3 Myl. & K. 76.

(*e*) 1 Joh. 536.

(*f*) 4 Russ. 34.

(*g*) 18 Beav. 87.

the statute," which might well be supposed to describe interests as well as persons, and in all of them the persons were those who would be entitled under the statute, but in no respect are the circumstances the same here. And in *Horn v. Coleman* (*h*) Vice-Chancellor *Stuart* stated the rule to be that such legatees would take a joint estate, though in that case he thought the particular words of the will established an exception to that rule.

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As to the Statute of Limitations. The argument on the other side amounts to this, that though pecuniary legacies are within the statute, yet if a legacy of interest is to be paid to one for life, and after his death to another in remainder, and the executor alters the investment, the statute does not apply, for by this investment the executor is constituted a trustee, and comes within the exception. No rule of law justifies such an argument. But even if such was the rule, the result does not follow here. In *Philippo v. Munnings* (*i*) there was a conversion of the fund which might alter the character of the person to whom it was entrusted; there is none here, and the statute was intended to prevent a man, who was entitled on the death of a previous person, from proceeding after a lapse of twenty years.

As to acquiescence: the principle of equity is that if a man stands by and allows another to act in a certain way he misleads that other, and it is not of importance that he did so with or without accurate knowledge of his own legal rights.

The Lord Chancellor: (Lord *Campbell*):

My Lords, considering the staleness of the Plaintiffs' demand in this case, and the disturbance that it gives to a

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(*h*) 1 Sma. & Gif. 169.

(*i*) 2 Myl. & Cr. 309.

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course of dealing which had proceeded *bonâ fide* in the testator's family for so many years after his death, I confess that it would have been agreeable to me to discover any ground on which, according to the rules of law, the claim could have been resisted. But after the elaborate arguments which we have heard on both sides, and a reference to the numerous authorities relied upon, I am bound to say that, in my opinion, the decree of the *Master of the Rolls* must be affirmed.

It seems to me quite clear that upon the just construction of this will the personal representatives of the testator's son were, in the events which happened, entitled to a share of the personal property in question; the son, having been one of the blood, or next of kin of the testator, who at the testator's death would, by virtue of the Statute of Distributions, have been entitled thereto in case the testator had died intestate. Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death.

There is here a bequest to the testator's son, *Robert*, for life, and afterwards to his children, and in case of his having no children, unto such person and persons of blood or next of kin of the testator as would, by virtue of the Statute of Distributions, have become and been then entitled thereto in case he had died intestate. *Robert*, the son, was one of the class who, as next of kin of the

testator, would have been entitled at the testator's death to his personalty had he died intestate; and the son having died without having had any children, his personal representatives, *primâ facie*, are entailed to an equal share with his four surviving sisters, the other individuals of the class. There may be, as in the last case of *Wharton v. Barker*, before Vice-Chancellor *Page Wood*, a clear indication in the will that notwithstanding the use of such expressions, the time for ascertaining the class is the time fixed by the will as the period of distribution. But in the will now to be construed nothing appears to indicate an intention in the testator contrary to the general rule; and on the contrary the second "*then*" in this limitation, seems expressly to refer to the time of the testator's death as the period when the class was to be ascertained.

I therefore consider it quite unnecessary again to go over the long string of authorities on this subject, and to try to reconcile them, or to point out any that must be considered erratic.

The only feasible argument against the right of the representatives of the son to a share in the personalty, appeared to me to be that the next of kin might be considered to have taken as joint tenants, and that the joint tenancy was not determined in his lifetime. I was immediately struck by the objection, that if this could be rested on any rule of law, it could not have been according to the intention of the testator; for, although he might not actually have thought of his son's representatives taking any share on the son dying without children, he could not have meant that if one of his daughters should die leaving children in the lifetime of the son her children should not take a share. But we were told that upon the authorities this rigid rule of law was established. However, on reference to the authorities it will

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be found that in every case in which there has been a gift to persons entitled under the Statute of Distributions, the statute has been held to regulate the interest taken as well as the parties to take; and that upon the death of individuals of the class who were so entitled, representation has been always admitted. These authorities, I have reason to believe will be fully examined and commented upon by a noble and learned friend, whose view of this question your Lordships will have the very high advantage of hearing, and, therefore, I abstain from any farther reference to them. The interest being determined by the interest given to the next of kin as upon an intestacy, it is clearly not a joint tenancy; nor indeed is it, strictly speaking, a tenancy in common. It is enough to say, that in case of the death of one of the class, representation is admitted.

To the next objection, founded on the Statute of Limitations, 3 & 4 *Will.* 4, c. 27, the first answer attempted was, that this statute is confined to real estate, and does not apply to a pecuniary legacy not charged upon land. But I am of opinion that section 40 would be a bar if this were a suit for a legacy. Limiting the time for actions or suits to recover any sum of money secured by mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at "law or in equity," it adds, "or any legacy," *i. e.*, any action or suit to recover any legacy whatsoever, whether or not it be charged upon or payable out of any land or rent at law or in equity.

A better and a conclusive answer to the objection is, that this is neither action nor suit to recover a legacy. The Defendants are trustees, in whom the personal property of the testator was vested on certain trusts. A considerable part of that property still remains in their

hands undisposed of; for this they are still accountable to the *cestui que trust*; and the present is a suit calling on them to account for a share alleged to be due to the Plaintiffs as representatives of one of the next of kin of the testator. It can hardly be contended that there being a continuing duty to distribute the property among the next of kin, and the trustees having from time to time paid the interest to the daughters of the testator or their representatives, they were at liberty at the expiration of 20 years from the death of the son, to claim a right to his share as their own property.

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By the only remaining objection I was at first much struck, and I thought it might possibly be substantiated by showing, that from the course of dealing which had so long prevailed in the family, founded upon the supposition that the class to take on the son dying without children was to be ascertained at his death, not at the death of the testator, and that the daughters were entitled to divide the whole to the exclusion of the representatives of the son, a family agreement might be presumed to that effect, which cannot now be disturbed. Had a doubt really existed as to the construction of the will in the lifetime of the son, and had it been agreed among all the members of the family that the son should be considered as having no interest in the property on his death without children, and in consideration of this the mother had made over to him large sums of money which she would otherwise have bestowed upon her daughters, I do not think that after the death of the mother the representatives of the son would have been permitted to set aside the agreement on the ground that it proceeded on a mistake of law as to the proper construction of the will. The son having been lucrated by the mistake, and the allowance to the daughters having been diminished by it, his representa-

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tives could not fairly claim from the trustees the son's fifth share of the property, although he might have been one of the five next of kin entitled to it.

But according to the evidence the question was not considered doubtful. Although fraud is not imputed, it appears that the husband of one of the sisters, a solicitor, and the solicitor for the family, asserted as clear law, that the son would have no title to a share as one of the next of kin. There was no consideration for the son renouncing his right. The chief part of the mother's advances to him was made while he was quite a young man, likely to have children, and although the correspondence by letter between the mother and son, when he was moribund, showed that they reciprocally took an erroneous view of his rights, he then gained no advantage which could prevent his representatives, at any subsequent time, from claiming a share to which, on a proper construction of the will, they were entitled.

For these reasons, my Lords, I must advise your Lordships that the appeal be dismissed with costs.

Lord *Brougham* :

My Lords, I take entirely the same view of this case with my noble and learned friend, after having at one period of the discussion had very considerable doubt upon the point of joint tenancy ; but upon examining the case itself, and upon examining former cases, I have come to the unhesitating opinion that that doubt has no foundation. The rule is, that where a testator gives a direction for a class of persons to take according to the Statute of Distributions, that is to be regarded not merely as a direction to point out or discover the persons who are to take, but as affecting the interests so to be taken.

My Lords, the cases are almost innumerable ; my noble

and learned friend has referred to a very able statement of those cases which we have had the benefit of having access to, which has been prepared by my noble and learned friend opposite, who will presently state them more fully to your Lordships. I rely upon *Jacobs v. Jacobs* and *Lewis v. Morris*, as laying down clearly this principle. There was some doubt expressed upon the point in the case of *Godkin v. Murphy* by Vice-Chancellor *Knight Bruce*. There was no decision there, but he indicated a strong inclination of opinion; but in the subsequent case of *Martin v. Glover*, and also in the case of *Bird v. Luckie*, he certainly came to an opposite conclusion. I therefore consider that the cases taken altogether are all one way upon this point, namely, that where under a will property is to go to the persons entitled under the Statute of Distributions, and there is no indication of an intention to exclude the effect of the Statute of Distributions as to interest as well as persons, that Statute must be applied to determine the interest as well as the persons. I hesitate to say that I feel no doubt that they did take the inheritance as tenants in common, but it is sufficient to say that they did not take in joint tenancy.

I therefore think with my noble and learned friends that this appeal ought to be dismissed.

Lord Cranworth :

My Lords, upon the main question raised in this cause, namely, the question whether, on the death of *Robert Downes* in 1832, the residuary personal estate of the testator became divisible in fifths or in fourths, we should, I believe, have been fully prepared to give our judgment at the close of the argument.

All of your Lordships then present were satisfied that the decision of the *Master of the Rolls* was in strict con-

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ormity with the law as now understood. Where a testator, having by his will, made contingent dispositions of his estate or of any part of it to take effect after the termination of particular interests for life, has proceeded to direct that if the contingencies do not arise, on which those dispositions are to take effect, then the property shall go to his next of kin according to the statute, the courts have in modern times held that *primâ facie* his language is to be taken to refer to those who are his next of kin at his death, not to those who may happen to answer that description at the determination of the preceding particular interests.

This rule of construction in general prevailseven though the person or persons taking as next of kin, or some or one of them, may have been the person or persons entitled to the particular interest. It is true that there are authorities which have held that in such cases the property is to go to those who were next of kin at the termination of the preceding interests; and it is impossible to say that the language of a will may not be such as to show that persons answering the description of next of kin according to the statute at some time other than that of the testator's death, may have been those intended to take. But as a general rule, the death of the testator is the time to which the testator must be held to refer. Whether the circumstances which have induced the Courts to put on the will a construction different from that which the general rule would have prescribed, have in all cases been sufficient to warrant the decisions, is a matter on which I do not think it necessary to speculate. It is sufficient to say that I agree with the *Master of the Rolls* in the conclusion at which he arrived in this case, namely, that there is nothing in this will to warrant a deviation from the general rule. Neither the circumstance that the son was himself one

of the next of kin, nor the use of the words "then entitled," as describing the person to take in the event which happened of the son dying without issue, is sufficient to affect the construction.

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The son was one of the persons of the blood of the testator who would, by virtue of his Statute of Distributions, have become entitled to his personal estate if he had died intestate; and, even assuming that the word "then," as connected with the word "entitled," is to be read as an adverb of time, still the time indicated is not the time of the death of the testator, but the time when the persons would come into the enjoyment of that which is bequeathed to them. The legatees to take on the son dying without issue are not the persons who would have been entitled if the testator had *then* died, but those who would *then* be entitled if the testator, when he died, had died intestate.

On two other questions discussed at the bar none of your Lordships, I believe had, at the close of the argument, any doubt. I allude to the defences set up, grounded, first, on the Statute of Limitations, and, secondly, on the long acquiescence of all parties interested.

The Statute of Limitations can have no operation in a case like the present, where the residuary estate has been set apart, and appropriated on the trusts of the will, whatever those trusts may be; as between trustee and *cestui que trust*, the statute does not apply.

The defence resting on the ground of lapse of time and long acquiescence obviously fails. There has been no acquiescence after the parties interested were apprised of their rights; and there is nothing to satisfy me, if that be material, that any of the parties have, under a mistaken notion of their rights, made dispositions of their

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property which they would not have made if their rights had been correctly understood.

On all these grounds your Lordships were, as I believe, prepared at the close of the argument, to express your concurrence in the decree of the *Master of the Rolls*. But a point was raised in the course of the discussion here, not it seems argued before the *Master of the Rolls*; at all events not adverted to by him in his judgment. It was contended that, assuming it to be true that the son, as well as the four daughters, were entitled to claim, as coming under the description of one of the next of kin of the testator, entitled, according to the Statute of Distributions, still his representatives could have no claim, as he and his sisters must be deemed to have taken as joint tenants; and so by his death, the whole interest survived to his sisters. On this point I have felt considerable doubt. The language of the will merely indicates, by a general description, the persons who are to take the residue. They are to be the persons who, being of the blood of the testator, would have been entitled to his personal estate by virtue of the Statute of Distributions. This would exclude the widow, and would embrace only his son and four daughters, and therefore it was said the will must be read as if the direction had been that the trustees should hold the residuary moneys, stocks, funds and securities in trust for the son and four daughters, which undoubtedly would have made them joint tenants. When the testator died, it was certain who the persons were who would take in the event of the son dying without issue; and it was contended that the will might therefore be read as if, instead of describing those persons by the description of next of kin, according to the statute, the testator had described them all by

name, in which case they would have taken as joint tenants.

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I am far from saying that interpreting the testator's language with strict grammatical accuracy the construction contended for might not be correct. But an examination of the authorities has satisfied me that we cannot act on such a construction without overruling a number of decisions, which have given to words similar to those now before us, an interpretation different from that contended for by the Appellant. The authorities seem to establish, that where there is a bequest to the persons who would have been entitled under the Statute of Distributions, those persons are to take as they would have taken if there had been an intestacy.

In *Mattison v. Tanfield* (*j*), there was a devise of real estates in trust for the person or persons who at my decease shall be next of kin of *R. D.*, according to the statute. It was held that the persons entitled took unequal shares *per stirpes*, and not *per capita*. The question of joint tenancy did not arise in that case, as the devisees were expressly made tenants in common; but the circumstance that they took in unequal shares *per stirpes*, shows conclusively that the words used did more than merely indicate who were the persons to take.

In *Martin v. Glover* (*k*), under a bequest to the persons who would have been entitled under the Statute of Distributions, the widow and only child were held to take in the proportions pointed out by the statute, a construction necessarily excluding joint tenancy.

In *Jenkins v. Gower* (*l*), under a similar bequest, where the testator left a widow and a sister, but no issue, the

(*j*) 3 Beav. 131.

(*l*) 2 Coll. 537.

(*k*) 1 Coll. 270.

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widow and sister were held to take equally as tenants in common.

The same principle was acted on in the subsequent cases of *Jacobs v. Jacobs* (*m*), *Horn v. Colman* (*n*), *Lewis v. Morris* (*o*).

I am aware that in the case of *Richardson v. Richardson* (*p*), Vice Chancellor *Shadwell*, in construing a similar bequest, held that the widow and four children of the testator took as joint tenants, but this is the only case in which such a construction has prevailed, for *Godkin v. Murphy* might have been decided on other considerations, and the very learned judge, whose decision it was, has more than once intimated distrust of its correctness.

Considering, then, how probable it is that many estates have been administered on the faith that the law has been correctly understood in the numerous cases to which I have referred, and considering farther, that the rule of construction there acted on is one which recommends itself to the common sense of mankind, as probably carrying into effect the real intention of the testator, I think your Lordships ought not to depart from it merely because, according to the strict grammatical interpretation of the words, they do no more than point out who are the persons intended to be legatees, without indicating the quantum or quantity of the interest they are to take.

I will only add, that I do not think the case is altered merely because the persons to take are not all the next of kin according to the statute, but all excluding (as in this case) the widow. The principle must be the same whether all are to be benefited, or only some. The question is, whether the statute is to be looked to as the

(*m*) 16 Beav. 557.

(*n*) 1 Sm. & Giff. 169.

(*o*) 19 Beav. 34.

(*p*) 14 Sim. 526.

guide in interpreting the language used, and as showing not merely who are to take, but how, and in what proportions they are to take. If it is, I see no difference whether all the persons entitled under the statute are indicated, or only a part of them.

On these grounds I advise your Lordships to dismiss this appeal with costs.

Lord *Wensleydale* :

My Lords, three questions arise in this case ; the first, as to the construction of the clause in the will of the Reverend *Andrew Downes* ; the second, whether the Plaintiff's claim was barred by the Statute of Limitations ; third, whether the laches of the Plaintiff in lying by for so many years afford any answer.

I think it unnecessary to enter into the second and third questions ; I agree in the opinion so clearly expressed by the *Master of the Rolls* upon that part of the case.

The only question remaining is, as to the construction of the clause in the will, which gives the property over in the event of there not being a child or children of *Robert Downes*, who should obtain a vested interest under the prior trust in the property devised. On the part of the Appellant it was contended, first, that the true construction was, that on the event occurring, the persons to whom the property was to be given, were those who would have been next of kin of the testator if he had *then* died intestate ;—secondly, that the clause only designating the persons who were to take by description, and not stating what interest they should take, the true construction was, that it should be read as if all those persons who filled that character were introduced by name into the will ; and so read, that they must all take the entire interest,

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and there being no words of distribution, they must all take as joint tenants.

I agree in opinion with my noble and learned friends on the first of these propositions. On the second I am not satisfied, so as to be able to concur with them.

For the proper construction of this devise we must apply the established rules. The question is strictly not what the testator meant, but what is the meaning of the words; for the use of the expression "the intention of the testator," is apt to lead the mind to speculate as to what the testator meant to do, instead of inquiring what he has done. And farther, the words used must be read in their ordinary and grammatical sense, unless that construction would lead to some obvious absurdity or inconsistency repugnant to the declared intentions of the testator, to be collected from the whole instrument.

It is much more useful to attend closely to these rules, than to look out for guides in decisions on the construction of words in similar instruments. It seldom happens that the decisions on the meaning of words in one instrument are of any assistance in the construction of others, the context in each case, and the circumstances admissible in evidence vary so much as to give a different meaning to the expressions used.

It may happen indeed, but it must be rarely, that some particular words have by a long previous course of decisions acquired a certain meaning, and may be supposed to have been used in that acquired sense by the framer of the instrument, but subsequent decisions on somewhat similar words used in other instruments can hardly ever be of the least use, though it is the common practice to quote them all at length.

Applying these rules, the persons who would by the

Statute of Distribution of Intestates' Effects have been entitled to them in case he died intestate, are those who filled the character of wife or next of kin *at the time of the testator's death*. The testator has provided that those (except the widow), if there should be no child of his son *Robert* who should obtain a vested interest, should receive the residue of his estate; but he has not said that those who would have been entitled if the testator had *then* died, that is died at the time of the event happening, should be entitled. The daughters and son of the testator are the persons who answer the description. It has long been held that courts should try to construe every legacy so as to make it vest at the earliest possible period consistent with the words of the bequest, and not to be contingent unless the words require it; and therefore we ought to hold that this legacy to the next of kin should be construed as giving the residue to the son and daughters, subject to the son's life estate. To interpolate the word *then* before the word *died* is to add to the will something that is not within it, and is contrary to the rule of construction of written instruments, now fully established, of looking for the meaning of the words in the will, but adding none. I should rather have thought, if there was not so strong a tendency in Courts to construe all legacies to be vested at the earliest possible period, that the natural meaning of the words used was, that, on the death of his son without issue, the property should then be divided amongst those who filled the character of next of kin at that time, and not at that when the testator died, and that the son could not then have taken a share, because he was no longer alive. But in compliance with the rule above mentioned, I think we ought to hold that all who were next of kin at his death then took a vested interest in remainder after the son's life estate. I think, therefore, that the *Master of*

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the Rolls came to a perfectly right conclusion on this part of the case.

The next question is, what is the proper construction, applying the same rule, of the latter part of the clause in question?—[His Lordship read the clause.]—The persons who are the intended legatees are sufficiently described, but nothing is expressly said as to the nature of the estate they were to take. When those persons are ascertained, you are to insert into the will their names; and that done, the persons so named would take the whole, and there being no words of distribution, would take the whole as joint tenants, unless you can collect some farther qualification from other words in the will. My noble and learned friends are of opinion that this may be done, and my doubts as to that part of the case will produce no effect. I think if the testator had left *the whole* to those who would have been entitled thereto under the Statute of Distributions, there might be some good ground to say that he meant them to take the whole as they would have taken it under an intestacy. That is the case of *Horn v. Colman* (*k*), before Vice-Chancellor *Stuart*, for the next of kin were the only persons there entitled, and other cases to the same effect which were cited in the argument. But in this case he has given *the whole* to those who, under the statute, would take only two-thirds, for the wife would take one-third. It seems to me that the bequest, taken as it stands, means clearly that the next of kin are to take *the whole*. He expresses no intention that they are to take less than the whole. It cannot be held that the bequest is to be cut down to two-thirds, and that he died intestate as to the remaining one-third. If that could be done, those

who were next of kin to the testator's widow, who died in 1836, at the time of her death would be entitled to share that one-third, and the decree would not be right. But I think it impossible to contend that the meaning of the words used is not that the legatees are the persons to take the whole.

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The *Master of the Rolls* suggests that the words "would have been entitled thereto in case I had died intestate," mean as if he had died intestate, and the persons of my blood, who are the next of kin pointed out by the statute, *had been the only persons entitled under the statute.*

But this is to introduce many additional words into the will. Whether the testator had the idea of so bequeathing his property, is a pure matter of conjecture, very likely not an improbable one, but the words to carry that intention into effect are wanting. If he meant it, he certainly has not said so.

The result is, that in putting a just construction on this will, I cannot help thinking we ought to hold that the testator meant that all the next of kin should take the whole, and not having expressed any other intention, they must take as joint tenants, and consequently that on the death of *Robert*, the sisters took by survivorship. And this result is satisfactory, as it is in conformity with the mode in which the members of the family have enjoyed the property for so many years.

Lord Kingsdown:

On the only point on which there is any difference of opinion amongst your Lordships, I have never myself entertained any doubt. On the happening of the event contemplated, the trustees are "to pay," &c.—[His Lordship read the clause.]—There is no gift except in the

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direction to pay and transfer. There is no expression of the interest which any of the persons who may answer the description are to take, except by reference to their title under the statute. They are to take according to their title under the statute. The words seem to me, according to their natural import, to mean this: "My trustees shall transfer the funds according to the title created by the statute amongst my next of kin," and I think that this is the construction settled by the decided cases. It is useless to go again through the authorities which have been cited by my noble and learned friend below me. It may, however, be worth while to make one or two observations on the two cases which are supposed to be opposed to this construction, which I think the true one, the cases of *Richardson v. Richardson* and *Godkin v. Murphy*.

In *Richardson v. Richardson* (*r*) the trust was to assign unto and among the person or persons who at the time of the testator's death would be entitled under the Statute of Distributions. There were a widow and four children, and it was argued on behalf of the children that the words "unto and amongst" created a tenancy in common (for which authorities were cited), and that the children were, therefore, entitled to take equal shares as tenants in common with the mother.

It was argued on the other side, that the statute was to be resorted to not only for the purpose of ascertaining the parties to take, but also the shares. The *Vice Chancellor* held that the Plaintiffs, *i. e.*, the children and their mother, took the estates in equal shares as tenants in common.

This case occurred in 1845, but neither of the preced-

(*r*) 14 Sim. 526.

ing cases of *Mattison v. Tanfield* and *Mattin v. Glover* was referred to. This decision proceeded, as I collect, on the ground that the gift to the legatees as tenants in common excluded the statute, and had the same effect as would have been attributed to the word "equally." No reason is assigned in the report for the judgment which is expressed in the words above quoted.

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The case of *Godkin v. Murphy* (*s*), when it is examined, has really no bearing upon the question. The limitation there was to such persons as would be entitled under the statute. There was no decision; but Lord Justice *Knight Bruce*, then Vice-Chancellor, expressed an opinion, that as the testator had made a gift to those who would be entitled if he had made no gift, he must be understood to intend something different from that which would have happened if he had made no gift, and that, to create such difference, the words must be read either as intending next of kin at a time different from that provided by the statute, or as creating an interest different from that given by the statute, viz., a joint tenancy, instead of a tenancy in common amongst those who would be entitled under the statute. This reasoning is not, perhaps, very satisfactory. It seems to me inconsistent with the subsequent decision of the same learned Judge in *Martin v. Glover*, and he himself in the case of *Bird v. Luckie* (*t*), expresses some doubt about it. But however that may be, the ground of the observations in that case entirely fails in the present, for here, there was an obvious reason for the gift, though the parties intended to take were to take according to the statute, for the next of kin were alone the objects of the testator's bounty, and the widow was excluded.

The authorities seem to me to bear out the proposition,

(*s*) 2 Yo. & Coll. 351.

(*t*) 8 Hare, 307.

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in itself (as I think) perfectly reasonable, and most likely to give effect to the intention of testators, that under a direction to pay to those entitled under the statute, if no other expression or indication of intention be found as to the interests to be given, reference must be had to the statute for the measure as well as the objects of the gift. The rule laid down by Vice-Chancellor *Stuart* in *Horn v. Colman*, that if the reference to the statute is for the purpose of ascertaining only the object, and not the measure of the gift, the parties will not take according to the statute, is no doubt a sound one, though the cases to which he refers in support of it do not seem to apply. There may be words to restrict the effect of this reference, as it was held that there were in *Richardson v. Richardson*, and as Lord *Langdale* held, that there might be in *Mattison v. Tanfield*, such as "equally" amongst the objects, and so on, but it seems to me that the other is the natural construction of the words, and that, according to the authorities, unless there be something in the context to exclude it, it must prevail. For these reasons I think that the children took as tenants in common.

Mr. *Follett*. Will your Lordships permit me to say one word with regard to the costs of this appeal. Your Lordships observe that the difficulty is raised by the act of the testator; and there is some difference of opinion among your Lordships, owing to the obscurity in the will; and probably your Lordships may think it right to do in this case as was done in that of *Wing v. Angrave* (u), where there was a difference of opinion among your Lordships, not to order the costs of the appeal to be paid by the Appellant. I apprehend that this is a case in

(u) *Ante*, Vol. VIII. pp. 183-224.

which, according to the ordinary course, the costs would be paid out of the testator's estate, as the difficulty has been created entirely by him.

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The Lord Chancellor. I shall readily defer to the view which your Lordships may take upon this point, but I have always a reluctance, sitting in a court of appeal, to order the costs to be paid out of the estate, because it may have the effect of encouraging appeals where there may be no ground for them. I do not say that this was an improper appeal, but I have known appeals brought in the hope that the costs would be paid out of the estate; but if your Lordships are of opinion that it should be so, I shall readily acquiesce.

Lord Kingsdown. I think there should be no costs.

Lord Cranworth. I think the circumstance of long acquiescence may be taken into consideration upon the question of costs.

The Lord Chancellor. I am very glad to concur in dismissing the appeal without costs, considering the long acquiescence which there has been. I expressed my opinion that, after the long acquiescence, it was to be regretted that there should be any disturbance of the course of dealing in the family.

Lord Brougham. On that ground I agree in no costs being given, but not at all upon the ground of their being a doubt expressed, or even a difference of opinion. That could be no ground whatever.

Lord Wensleydale. No costs are given, but we do not order the costs to be paid out of the estate.

Lord Brougham. No, it is without costs.

Decree affirmed, and appeal dismissed.

Lords' Journals, 24 July 1860.

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Pleading.

The EASTERN COUNTIES and the LONDON } *Appellants.*
 and BLACKWALL RAILWAY COMPANIES }

FRANCIS MARRIAGE - - - - *Respondent.*

The Lands Clauses Consolidation Act, 1845, is divided into different subjects by headings, which are accompanied by corresponding words in the margin. Thus there is a division marked by the words “intersected lands” in the margin. In the body of the statute is a line containing these words as a heading: “And with respect to small portions of intersected land, be it enacted, as follows.” Then come two sections, the first of which (the 93d) begins thus: “If any lands not being situate in a town, &c.” The second of the two sections (the 94th) begins, “If any *such* land shall be so cut through and divided:”

HELD, that the word *such* in the 94th section is not confined to “lands not being situate in a town,” as described in the 93d section, but applies to the words in the general heading, “small portions of intersected land.”

An action was brought against a railway company for not making a communication between small portions of intersected lands as required by the 93d section. The company pleaded and claimed the benefit of the 94th section, and in the course of the plea averred that the lands were not situate in a town. This averment was found against the company:

HELD, that it was an immaterial averment, and that notwithstanding this finding, the company was entitled to the benefit of the 94th section.

THIS was an Appeal in pursuance of the provisions of Common Law Procedure Act, 1854.

The Plaintiff was the owner of certain lands in the parish of *Leigh*, in the county of Essex. The Defendants made their railways under the provisions of certain private Acts passed in 1852 and 1854, with which the provisions of the Railway Clauses Consolidation Act of 1845 were incorporated. The question to be decided on appeal related solely to the construction of two clauses,

93 and 94 in the last-mentioned Act. The Plaintiff declared in mandamus. The declaration set forth the title of the Defendants under these Acts, and then alleged that the Plaintiff was the owner of the property in question, consisting of a capital messuage, with a yard in the rear thereof and adjoining thereto, and buildings on each side, and also a garden in the rear of the yard, and adjoining thereto; that these premises were situate in a town within the true intent and meaning of the said Act, called, "The Lands Clauses Consolidation Act, 1845:" that the Defendants constructed their railway upon and through the lands and premises of the Plaintiff, and thereby intersected, cut through and divided his lands and premises, and severed the garden from the messuage, and interrupted the use of the same, and it thereby became necessary, for the purpose of making good such interruption, that accommodation works should be made by the Defendants; that the Plaintiff demanded of the Defendants to make such accommodation works, but that they refused, &c. And so he prayed that a mandamus might issue. The Defendants pleaded several pleas, of which the third alone is material to be considered. It contained, among many others, the following allegation: "And the Defendants say that the said pieces of land, premises, and hereditaments so cut through and divided were not situate in a town or built upon, and that the said last-mentioned part so severed as aforesaid was of less extent than half a statute acre, and of less value than the expense of making the said communication or any such communication as by any of the said Acts of Parliament the Defendants were, or would be, compellable to make;" and that the Defendants required him to sell the same, &c.

Issue was joined, on this plea.

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At the trial before Mr. Baron *Martin* on the 7th July 1856, the Defendants did not prove their allegation, "That the said pieces of land, premises, and hereditaments so cut through and divided, were not situate in a town," and it was found by the jury that the premises were situated in a town; whereupon the learned Baron directed the jury to find a verdict for the Plaintiff, and reserved to the Defendants leave to move to set aside that verdict, and to enter a verdict for them, upon the third plea, if the case, as disclosed by that plea, and as proved, should be held to come within the 94th section of the Lands Clauses Consolidation Act, 1845.

The rule was obtained and cause was shown before Barons *Alderson*, *Martin*, and *Bramwell*, and time was taken to consider the judgment. Before it was delivered, Mr. Baron *Alderson* died; and as Barons *Martin* and *Bramwell* differed in opinion, the rule was, in point of form discharged (a). An appeal was heard in the Exchequer Chamber, before Lord Chief Justice *Cockburn*, Justices *Erle*, *Williams*, *Crompton*, and *Willes*: and the last-named learned judge delivered the opinion of Justices *Williams*, *Crompton*, and himself in affirmance of the judgment of the Court of Exchequer, Mr. Justice *Erle* being of a different opinion. This appeal was then brought.

The judges were summoned, and Lord Chief Justice *Erle*, Lord Chief Baron *Pollock*, Mr. Justice *Wightman*, Mr. Justice *Williams*, Mr. Justice *Crompton*, Mr. Baron *Bramwell*, Mr. Baron *Channell*, and Mr. Justice *Blackburn* attended.

(a) 2 Hurl. & Nor. 623, 631, 645.

Mr. *Mellish* and Mr. *Harrison* for the Appellants:

The question here is, as to the construction of the 93d & 94th sections of the Lands Clauses Consolidation Act, 1845. *Falls v. The Belfast Railway Company* (b) is a case in which a decision has already been pronounced in *Ireland*, to the effect that the 94th section applies to all intersected lands, as described in the general heading put above these sections (c), and is not confined to lands situated in a town

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(b) 11 Ir. Com. Law Rep. 184.

(c) There is in the printed edition of the Statutes a marginal division, entitled "Intersected Lands;" there is then a heading in the words printed in a separate line: "And with respect to small portions of intersected lands, be it enacted as follows." The 93d section immediately afterwards begins thus: "If any lands not being situate in a town or built upon, shall be so cut through and divided by the works, as to leave, either on both sides, or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small parcel of land require the promoters of the undertaking to purchase the same along with the other land required for the purposes of the special Act, the promoters of the undertaking shall purchase the same accordingly, unless the owner thereof have other land adjoining to that so left, into which the same can be thrown so as to be conveniently occupied therewith: and if such owner have any other land so adjoining, the promoters of the undertaking shall, if so required by the owner, at their own expense, throw the piece of land so left into such adjoining land by removing the fences and levelling the sites thereof, and by soiling the same in a sufficient and workmanlike manner." The 94th section follows in these terms: "If any such land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert, or other such communication between the land so divided, as the promoters of the undertaking are, under the provisions of this or the special Act compellable to make, and if the owners of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land, and any dispute as to the value of such piece of land, or as to what would be the expense of making such communication, shall be ascertained," &c.

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or not built upon, to which alone the 93rd section refers.

Mr. *Lush* and Mr. *Couch* for the Respondent :

That case cannot be cited as authoritative in this argument, for that is now the very point in discussion. Besides, the dictum there is not adopted by Mr. Justice *Crampton*, who was one of the three Judges who heard that case (*d*).

The Lord Chancellor (Lord *Campbell*) proposed the following question for the consideration of the Judges :—
 “ Is the operation of the 94th section of the 8th Vict. c. 18, confined to lands not situate in a town or not built upon ? ”

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Mr. Justice *Blackburn* :

Mr. Justice
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In my opinion the operation of the 94th section of the Lands Clauses Consolidation Act is confined to land not situate in a town or not built upon. I might have confined myself to referring your Lordships to the reasons contained in the judgment delivered in the Exchequer Chamber by Mr. Justice *Willes*, in which I entirely concur ; but I will state some additional observations that have weight with me.

The question is entirely one as to the construction of the Act. We are bound to look at the language used in the Act, construing it with reference to the object with respect to which the legislature has used that language, but construing it in its ordinary grammatical sense, unless there is something in the subject matter or the context to show that it is to be understood in some other sense, and doing all this we are to say what is the intention of the legislature expressed by that language.

(*d*) It has not been deemed necessary to give the arguments of counsel, every possible topic being so fully referred to in the opinions of the judges and the judgments of the Lords.

The Lands Clauses Consolidation Act is one passed for the purpose of embodying in one Act the provisions usually introduced in special Acts, so that the whole or part of these clauses may be incorporated in special Acts. It was convenient to group together the clauses relating to different subjects, so that they might readily be referred to in the special Acts, and incorporated or excluded from them. For this purpose the various clauses relating to each separate subject are collected under separate headings. One of those headings is as follows: "And with respect to small portions of intersected land, be it enacted as follows;" under it follow two sections, 93, 94, and no more. [His Lordship stated both the sections.]

It is an ordinary rule, not so much of law as of the grammatical construction of the English language, that words of relation *primâ facie* refer to the nearest antecedent; and "such" in this passage is a word of relation referring to some land or other. The context shows that it cannot refer to the *adjoining land* which has been last mentioned. We have to say whether it refers to the lands mentioned in the beginning of section 93, which is the next antecedent, or to the "intersected land" mentioned in the heading to these two sections, which is an antecedent not very remote, but more remote than the other. The land in the beginning of section 93, is not only the nearest in position to the words "such land" in the beginning of section 94, but it is connected with similar words. In section 93 the language is, "if any lands, not being situate in a town or built upon, *shall be so cut through and divided by the works as to leave,*" &c. In the section 94 it is, "If any such land shall be so cut through and divided as to leave," &c. It certainly seems to me that no one, looking merely at the collocation of these words, could doubt that in the grammatical construction of those two sections, the one

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referred to the other, and that the lands mentioned in section 94 were to be such as the lands mentioned in section 93, viz., lands “not being situate in a town or built upon.” I agree that we are not to construe the Act merely from the collocation of the words, but the effect of this collocation is, that the 94th section is thus to be construed, unless the nature of the subject matter or the context show us that a different meaning was intended.

Besides this, looking at the language of sections 93 and 94, I see other reasons than the juxtaposition of the antecedent to the relative for thinking that the one section refers to the same subject matter as the other. The quantity of land specified in section 93 (which in terms does not apply to lands in towns or built upon), is half an acre, a quantity which in the country is generally of little value, in a town is generally of great value; and in section 94 the same quantity of half an acre is repeated; it seems difficult to say why, unless this section also is understood to be restricted to lands not situate in towns where such a quantity is of value. In section 93 there is a provision that the company shall not be bound to purchase the severed land, if the owner has land adjoining into which the same can conveniently be thrown, so as to be conveniently occupied therewith, in which case the company is to be at the expense of doing so. This is a provision not generally applicable to lands built upon, and therefore properly inserted in section 93, which is restricted to lands not in a town or built upon. In section 94 we find the same qualifications, “if the owner have not other lands adjoining such piece of land.” Why is this inserted, unless section 94 also is restricted to lands not in towns nor built upon? It could scarcely be in contemplation that the adjoining buildings should be levelled, in order to throw the small portion of land into their site. These matters which I have just pointed out, very strongly

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corroborate the grammatical argument derived from the juxtaposition of the words "such lands," to the "lands not situate in a town or built upon," and make it clear to my mind that the natural grammatical meaning of the words used by the legislature is such that, *primâ facie*, the two sections are applicable to the same lands.

The arguments used to show that we are not to understand the words in this their *primâ facie* sense, are not to my mind convincing. It was argued at your Lordships' bar, that throughout the Act the word "such" was so used as to show that the draftsman who prepared the Act always intended to use it with reference to the headings of the sets of clauses. I do not question that the word might have been so often and so perseveringly used in a peculiar sense, that a peculiar sense might be attributed to it. There may be an interpretation clause expressly declaring that the word "such" shall be taken to refer to the heading of the set of clauses, unless there be something in the context or subject matter to show the contrary, and I think that there might be a sufficiently constant use of the word in that manner to amount to an implied declaration to the same effect. But in order to justify such a canon of interpretation it must be shown that the word is systematically used in this peculiar sense. The passages referred to convince me that the word "such" in this Act has often been used without much regard to whether it was appropriate or not; at all events, I cannot find evidence justifying me in thinking it has been used on any system.

Then it is said that unless section 94 applies to small pieces of land in towns there are no provisions in the Lands Clauses Act relating to such pieces of land in towns at all. That is true; but I am not pressed by the argument. The legislature may have thought that a

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general rule could be devised applicable to the simple case of land in the country, but that it was impossible to make a similar rule generally applicable to the more complex case of land in the town; and may also have thought that the value of property in towns was so great that the expense of procuring special enactments in the special Act would not be excessive in relation to such property. I cannot tell whether this was thought or not, or what the reason was that induced the legislature to make the enactment as we find it. But at least there is nothing in confining the enactment to lands in the country (which, as it seems to me, it would be if understood in its ordinary grammatical sense), absurd or repugnant to justice.

Some of the judges have in their judgments in the Court below given reasons for thinking that a different enactment would have been mere expedient. They may be quite right, but it does not follow that the legislature thought the other enactment best, or intended so to enact; still less does it follow that the legislature has expressed such an intention, and that, I apprehend, is the only legitimate subject of inquiry. I dread, very much, the consequences, if once the judicature begins to trespass on the province of the legislature, and to pronounce not what the enactment is, but what it ought to be. If we do, I do not know where we are to stop. I think it much better, in construing an Act, to follow what has been called the golden rule, and to declare that to be the intention of the legislature which appears to be expressed by the words used, understood in their ordinary sense, though with reference to the subject matter and context, unless that is manifestly absurd or unjust, which certainly is not the case here.

Mr. Baron *Channell*:

The 8 & 9 *Vict.* c. 18, is an Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the taking of lands for undertakings of a public nature.

The reason for this consolidation is shown by the general preamble to the Act, and it deserves, I think, consideration. As might have been expected, the enactments contained in the statute embrace various objects or purposes. In different parts of the Act there are to be found classes of enactments applicable to some special object. Such enactments are in many instances preceded by a heading, *special* no doubt in one sense, as addressed to the object or purpose, but, where not otherwise provided for, *general* in its application to the enactments passed to accomplish the object.

These *various* headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me, a better key to the constructions of the sections which follow than might be afforded by a mere preamble.

The subject matter intended to be dealt with by the legislature in sections 93 and 94 was, as it appears to me, all small portions of intersected land, the legislature defining by specific enactments what in extent or value should be deemed small portions of intersected land.

The heading which immediately precedes section 93 is in these words:—"And with respect to small portions of intersected land be it enacted as follows." That heading may be read not only as a preamble to the two sections

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which follow, namely, 93 and 94, but also as words partaking and having the force of an enactment. For unless the words “be it enacted as follows” found at the end of the heading, are read in connexion with the 94th section, there would not only be wanting such words as are usually found in an Act of Parliament, viz., “be it enacted,” or “farther enacted,” but there would be wanting all equivalent words. There would be nothing to declare authoritatively that the 94th section is to be law.

It seems to me, then, that at least the *concluding* words of the heading, viz., “be it enacted as follows,” must be read as if those words were repeated after the end of the 93d and immediately before the 94th section. But if the concluding words in the heading are to be read as if repeated before the 94th section, why omit the preceding words of the heading? It seems to me, then, that the *whole* of the heading should be read as if repeated immediately before the 94th section, and if so read, there is no difficulty in construing the 94th section.

The words “not being situate in a town or built upon,” which are found in the 93d section, may be taken and read as if in a parenthesis. So to read the 93d section is quite consistent with the general heading. By apt words a limitation is engrafted upon the larger meaning conveyed by the heading, but there is no repugnancy.

The 94th section omits what I have termed the parenthesis or limitation found in the 93d section, unless the third word in that section, viz., the word “such,” is equivalent to a repetition of that parenthesis or limitation. By holding that that word is not equivalent to the insertion of the parenthesis, and by reading the 94th section without the parenthesis, this last section is construed consistently with the general heading just as the 93d section read with the parenthesis may be construed consistently

with the same heading; whereas to read the 94th section with the limitation found in the 93d section, which, if at all, is there only by the use in the latter section of the relative or qualifying word “such,” is to limit *all* the enactments relating to small pieces of intersected land exclusively to land not being in a town or built upon, a construction which does not, as it appears to me, give sufficient effect to the larger words of the heading. I cannot but think that if the legislature had intended to limit all the enactments to lands not being in a town or built upon, that that intention would have been indicated by the use of proper and restrictive words in the heading itself.

The word *Idem* it is said, *semper proximo antecedenti refertur*, Co. Litt. 20 b. No meaning of this sort has been as far as I am aware, given to the word *such*, whilst the notion of confining the reference made by the use of that word to the particular case described in the immediate antecedent has not been followed, even where, by so confining the words, no violence would have been done to the context, nor any repugnancy have arisen; see Second Institute, Reading on the Statute of *Marlbridge*, vol. i., ch. 6, s. 6, where, commenting upon the words “*per hujusmodi fraudem*,” referring to a particular feoffment, specially described, Lord *Coke* says, “by such fraud” is to be understood “*such* in mischief or *such* in inconvenience; and, therefore, all other fraudulent feoffments tending to the same end are within the statute, whatsoever colourable pretext they have, and so is this word [such] oftentimes taken in other statutes.”

It is said that there is a rule of grammatical construction, by which the word “such,” as a relative word, is taken to refer if not necessarily to the *next* immediate antecedent, to the nearest antecedent, by reference to which sense can be made of the context. It is necessary

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for the argument of the plaintiff in this case so to limit the rule, for the next immediate antecedent to the word “such” in the 94th section, would be the piece of land mentioned at the conclusion of the 93rd section, viz., the piece of land left and to be thrown into adjoining land, a construction which would create a manifest repugnancy; but if there are several antecedents, and you do not limit the word of reference to the next immediate antecedent, why refer to one more than another, except so far as the sense or general context guides you? .

I adopt the expression of Chief Baron *Macdonald*, in giving the opinions of the Judges to this House, in the case of *Thelluson v. Woodford* (c). The Chief Baron is there speaking of a will, but the observation is, I think, equally applicable to a statute. The *Chief Baron* says, “that construction is to be adopted which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent which is declared in the context, viz., that they” (that is, qualifying words) “should be applicable to such classes as require them, and as to the others, to consider them as surplusage.”

Mr. *Mellish* pointed out in his argument that the particular word “such” is used in many parts of the Act where its use is superfluous, inasmuch as with the word “such,” or without it, the Act would yet refer to the heading; he also pointed out that in other places, to prevent the application of the word “such” to the heading, and to give it a restrictive meaning, confined to the next

(c) 1 New Rep. 392.

immediate or some other antecedent than the heading, apt or at least sufficient words are used. Mr. *Couch* in his argument referred to other sections, tending to support the view contended for by the Plaintiff. The result of the reference by counsel on both sides to the sections of the Act leads me to the conclusion that the word "such" is in many instances inaccurately, or at least unnecessarily used.

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Upon the whole, it appears to me that there is no rule of law which, considered apart from a rule of grammatical construction, or governed by any well recognised rule of grammatical construction, requires that the word "such" in the 94th section should be limited to land not in a town or built upon. I think that the legislature intended by the 93d section to give a protection to the owner, a part of whose land might be taken for the purpose of the Act, and by the 94th section to give a protection to the Company, where the expense of making a communication would be a waste of the funds of the company and no benefit to the landowner, and that this intent is sufficiently manifest, notwithstanding a somewhat inaccurate use of the word "such." Companies can never avail themselves of the power conferred by the 94th section adversely to the landowner, for the power given is inoperative unless the landowner requires a communication. The matter, if any, in difference, is then to be referred to the decision of the tribunal pointed out by the Act. Considering such a reading of the Act as I have pointed out just and equitable, and not inconsistent with any legal or grammatical rule of construction, I answer your Lordships question by stating that in my humble opinion the word "such" in the 94th section is not confined to land in a town or built upon.

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Mr. Baron *Bramwell*:

I am of opinion that your Lordships' question should be answered in the negative. I cannot help thinking the case is very plain. I cannot, except in deference to the authority of those who think otherwise, entertain a doubt on it. I crave leave to refer to a proposed judgment prepared by me (*f*), by which I abide, but to which I wish to add the following:—

I beg to remind your Lordships of the ordinary practice of beginning the sections of an Act of Parliament with the words "Be it enacted," or other words of enactment. I do not say such words are essential, but that they are usual; they are also adopted throughout the statutes of the Session in which the 8 & 9 *Vict.* c. 18 was passed, and in that statute itself, wherever there is not a general heading or preamble, as there is to sections 93 and 94, I mean the heading, "And with respect to small portions of intersected land, be it enacted as follows;" see sections 92, 149, 152, and 153. This general heading is not only in good sense, but as matter of verbal accuracy to be considered as governing, and to be read before, each section which ranges under it, as though they had been numbered 1, 2, and so on. This is manifest from an examination of the statute. If so, all the reasoning for the Respondent about the ordinary grammatical construction, and words of relation referring to the last antecedent, is misapplied, because it is applied as though there was no such general heading.

Farther, I deny there is any inflexible rule, as suggested, that "such" must relate to the last antecedent. The sense must be looked at in each case. Here not only does all convenience require the reading to be as I sug-

(*f*) 2 Hurl. & Nor. 649.

gest, but there are other considerations. The general heading is, "And with respect to small portions of intersected *land*," in the singular; in section 93 it is "if any *lands*," in the plural, "not being situate in a town or built on;" in section 94 it is, "if any such *land*," in the singular, referring therefore to the heading.

Again, the construction of the Respondent would limit the general heading thus, as Mr. *Couch* acknowledged, "and with respect to small portions of intersected land *not being in a town or built on*." Why did not the framer so limit it? Why did he say, as he does, that he is dealing with small portions of intersected land *generally*, and not with some only? Farther, if "such" means "last mentioned," then, as Mr. Justice *Erle* said, it does not refer to land not in a town or built on.

I do not trouble your Lordships with an examination of other sections, which show (as Mr. *Mellish* pointed out) that "such" continually refers to the general heading, and when it is not intended to do so, the expression "last mentioned" is used. The word "such" does not relate to "small portions" but to "intersected;" and section 94 means if "any *intersected* land shall be so cut through and divided," &c. Probably a superfluous word, but not wrong, and having plenty of precedent.

I farther call your Lordships attention to this, that the two sections, 93 and 94, have entirely different objects. Section 93 is to protect the *owners* of intersected lands, and give *them* an option. They may keep the small portions or make the promoters buy them, *or*, having adjoining land, make the promoters throw the small portions into it. It is reasonable that that should be limited to land not in a town or built on. For unless it were, the promoters might have to pay very large sums of money; while small properties in a town can be enjoyed notwith-

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standing their smallness. For if the small piece is part of a house (which includes garden and outbuildings), the promoters can be made to purchase the whole. Section 92. *Grosvenor v. Hampstead Railway Company* (g); *Cole v. West London and Crystal Palace Railway Company* (h). If it is a separate house, it is as capable of enjoyment as though the next house or houses had not been taken; for all ways, public and private, must be left, or equally good ones substituted; not so if the land is agricultural, for small pieces then cannot profitably be used. There is good reason, therefore, why section 93 should be limited to agricultural land, none why it should extend to urban property, and plenty why it should not.

Section 94 is wholly different. It is for the protection of the *promoters*, and it is to give *them* the option either of making a communication if required, or of buying the small piece of land. Whether the word “or” is to be read “and,” may be doubtful when the latter part of the section is looked at, but I think not. Probably the framer meant that when the piece was less than half an acre, there need be no inquiry as to value; when more there must be. Be this as it may, whether “or” is to be read “or,” or “and,” the reason of the thing applies as much to property in a town, or built on, as to agricultural property. In each case it is to save the promoters wasting money in making a communication, which will cost more than the value, or probable value, of the land when it is under half an acre. As far as the promoters are concerned there is no more reason why there should be this waste in one kind of property than in another.

(g) 26 Law Journ., Ch., 731; (h) 28 Law Journ., Ch., 767.
 1 De G. & Jo. 446.

I cannot, with great respect, understand the expression “That section 94, by analogy, to the 93d, deals with the case of land of such small value, that half an acre or more of it may not be worth the expense of making a communication.” I do not here understand the use of the word “analogy;” I cannot see there is anything analogous in the two sections, except that they both relate to intersected land, both give protection to the respective parties intended to be protected, and both give protection as far as it is needed, and no farther; but then that requires that the protection to the promoters should extend to land, while protection to the landowner need not extend to land in a town or built on. Nor do I see why, because the promoters are not to be oppressed with the obligation to buy land in a town where there is no need for such a *burthen*, they should not be at liberty to do so where there is need for such a *privilege*, nor can I understand how the word “small” can be supposed to mean, in these sections and heading, “small in value.” Would any one say that the phrase, “small portions,” in the general heading, means small in value when it is followed by the next section with the words “a less quantity than half-an-acre.” That does not mean “less in value than half-an-acre,” for that is nonsense; the next phrase is, “*such* small parcel,” and in section 94 the expressions are used close together of “less extent” and “less value.”

The grammatical and verbal construction of the statute, I think, clearly with the Appellants, so also are the general object and intent of section 94; so also are good sense and convenience, as I now proceed to show. That mischief may arise from the Respondent’s construction is manifest from this case. It is true it is only a question if a few hundred pounds should be wasted; but if the cutting is deep enough, and the soil such as to make it necessary

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the banks should slope gradually, and foundations go deep, it might be a question of thousands. Now, I venture to say that while there is reason for the Appellants' construction, there is none for that of the Respondent; there is no inconvenience or hardship if the statute is construed as the Appellants construe it.

I will deal with the objections of the Respondent as far as I understand them. There seems to be a vague notion which, if made definite and expressed in words, would run thus: "Land in a town or built on may be worth more than its value;" or thus, "its value may be more than its worth," because it has or may have expectations and contingencies besides its value. Now this, as the very words show, is a mistake. Everybody who knows anything of compensation cases, knows that everything, present, future, absolute, or contingent, is taken into account in putting a value on land, or finding out what it is worth. It is an "improving neighbourhood," or it is "building land," or it has "brick earth," or chalk, or stone, or some other actual or possible advantage, for which the takers of the land have to pay handsomely. If it is said it may be an advantage the owner prizes and no one else, and it is hard to take it from him, I say the legislature does not acknowledge such fancies. Many a man might be unwilling to sell, at any price, land which had been in his family for ages, but he must do so. In short, the legislature has laid down a general rule, that all the land to be taken may be taken at a fair market value, with an addition for compulsory sale.

The next objection is, that great mischief might be done by severing parts of properties, and the case was put of a factory separated from a house, and "enormous" and "ruinous" loss ensuing. To this there are two answers. One was given by one of your Lordships, viz.,

compensation will be made; the owner will be no loser; the parts will not remain separate in his hands, but if he insists on a communication, they may be bought and paid for by a sum which *compensates*. The other answer is, the thing will never be done; because it is never profitable for takers of land to take under compulsory power more than they can help. It will never be done, therefore, where the property is of great value, unless indeed the cost of making the communication is enormous; and then all the alarming consequences supposed to exist, if the Act is construed as the Appellants construe it, will really ensue if construed as the Respondent construes it, with this difference, that the takers of land will be subject to enormous and ruinous loss without the option of being compensated.

The next objection is this: It is said, if section 94 includes land in a town or built on, that railway companies and other persons taking land would be buying vast quantities of houses and land. There really is no pretence for this. First. The quantity of land that may be held is invariably limited. Second. Superfluous land must be sold, section 127. Third. If the preceding difficulties were got over, the purchasing and holding of land not for the purposes of the undertaking, would be *ultra vires*, and a breach of trust, and might be set aside at the cost (I should think) of the directors. Fourth. Supposing such a speculation possible in point of law, and that the promoter's funds could be spared for such a purpose, it never would take place. It never would be profitable. As I have before observed, promoters of undertakings acquiring land under the compulsory powers of this Act, always pay more than the market price, and properly so; and I repeat that a Committee of your Lordships' House recommended that 50 per cent. should be

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added to such a sum as would be a fair price to a willing seller. I confidently ask if ever it was heard of that a railway company bought land to sell again, or to hold as a profitable speculation unconnected with the railway. In the face of these difficulties, it is said the Appellants' construction might tend to make railway companies proprietors in towns for purposes foreign to that of their creation. I ask whether it is right to test, not a principle but a rule of practice, as this section is, by putting an extreme case, theoretically possible, but practically impossible. The rule is "*ad ea quæ frequentius accidunt leges adaptantur.*" Which mischief is the more likely to happen, and the more necessary to be guarded against, the unlawful, wasteful purchase of land by railway companies in the face of the difficulties I have pointed out, or the exactions of a "rapacious or capricious proprietor"?

Lastly, the argument is used, that this, being the Appellants' statute, must be construed most strongly against them. Rules of this sort for construing documents are very often mere invitations for a superficial examination and unjust conclusion. But there is scarcely a pretence for applying such a rule to a General Act, a part of the general law of the land. Farther, I see no room for its application, for I see no matter of doubt.

In the result, it seems to me that grammar and the ordinary rules of construction, good sense and convenience are alike on the side of the Defendants, and that to decide this case for the Plaintiff will be contrary to the ordinary rules of construction; the grammatical and natural meaning of the words; will leave companies "exposed to unreasonable and extortionate demands" at the pleasure of any "capricious or rapacious proprietor;" and in this particular case will condemn the Appellants to an

operation as wasteful and idle as digging a hole for no purpose but to fill it up again.

Mr. Justice *Crompton* :

The question in this case is whether we can see distinctly that the legislature, by the 94th section of the Lands Clauses Act, has given the promoters the right of buying, compulsorily, the portion in question of the Plaintiff's land, the same being situate in a town. In order to make out the defence, it must appear that the legislature has expressed the intention to give such power. I do not find any sufficiently distinct expression of such intention to enable me to say that the legislature has so enacted. I was a member of the Court of Exchequer Chamber, and came to the conclusion which the majority of that Court adopted, and I entirely concur in the reasons for our judgment given by my Brother *Willes*.

The Appellants, in the argument before your Lordships, relied first upon the injustice and hardship to which companies might be subject if they could be compelled to make communications under the circumstances which exist in the present case, and had no right of buying the land compulsorily.

Allowing this argument its full weight, it does not seem to me at all to make out such an absurdity on the part of the legislature as to enable us to see that it must have intended to make the provision in question. The suggestion is not that we must alter the *primâ facie* meaning of the statute because it enacts an absurdity, but that it is absurd to suppose that the legislature has not made the enactment wide enough to provide against a suggested hardship. If I were to guess, I should say that the legislature had not its attention directed to the supposed hard-

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ship. If it had, it very probably might not have made the provision against such a hardship, by leaving the compulsory power in the hands of the companies; and I think it very likely that attention was directed, in framing both these clauses, to the distinction between country and town land, and that the legislature did not mean to legislate, in the 93d and 94th sections, for property in towns or built upon.

But the Appellants relied mainly on the second branch of their argument, in which they undertook to furnish a clue or key to the use of the word “such,” as used by the framer of this Act of Parliament. It could not be denied that “such” is in general a word of reference, relating to the last sensible antecedent, according to the rule by which words of reference are in general referred to the last sensible antecedent, a rule not depending on any nice technical distinction between such expressions as “Idem” and “Prædictus;” but a general rule of construing writings in the ordinary affairs of life. It was endeavoured, therefore, to take the case out of the general rule, by showing that throughout the Act, the word “such” referred to the heading introducing each new matter of legislation.

In my opinion, however, the Appellants failed in making out that the word “such” referred to the headings throughout the Act, in the manner suggested; they showed, indeed, several instances where the reference was to the heading, some, in which it might be either to the heading or the intervening clause; some where the words “last mentioned” were introduced, and some where, as they argued, the word was of no use; and it was said that the framer of the Act appeared to be so fond of the word “such,” that he used it on all occasions, whether wanted or not, an argument not quite consistent

with the notion of its being always used with reference to the heading, so as to give a key or clue to the use of the word in the Act.

It appeared, however, that with reference to the very first clauses, cited in support of this part of the argument, the 95th and 96th sections, the word “such” in the 96th clause clearly refers to the expression in the 95th, and not to the heading, as it speaks of any “such” “copyhold or *customary lands* ;” whereas the expression in the heading is only “copyhold lands ;” and several clauses were pointed out by the Respondent, where the word “such” most clearly referred to the intervening clause, and not to the heading.

I think, therefore, that the attempt to show that there was such a peculiar use of the word in question as furnished any safe key or clue to its meaning failed, and that we must treat the relative word “such” as *primâ facie* referring to the last preceding sensible antecedent, which is “lands not in a town or built upon.”

There are, moreover, several reasons in favour of the construction, according to which the word “such” would be taken in its *primâ facie* meaning, as relating to the lands mentioned in the preceding section. There certainly appears reason to suppose that the legislature intended to make a marked distinction between town and country, and to be careful and tender, as it was called at the bar, of town property. The dimension of half an acre, selected as the amount of what might be treated as of small value in the country, in the 93rd section, is selected again in the 94th, though obviously of very different relative value, if intended to apply to land in a town. The introduction also of the words “or of less value,” &c., which must mean where the land is more

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than half an acre, seems to me very unlike an intention to apply the enactment to town lands.

The provision as to the *adjoining lands* in the 94th section seems to refer to the corresponding enactment as to adjoining lands in the 93rd; and as the power is given to the company only, if there are no adjoining lands of the owners, it seems to imply that if there were such adjoining lands, the owners might require the company to throw one piece of land into the other, a provision hardly consistent with the supposition that the Legislature was dealing with town property. The 94th section seems to enact that the power is only to exist as in the 93rd section, where there is no adjoining land, and to leave the case where there is adjoining land of the owner to the operation of the 93d section, by which one piece is to be thrown into the other. There is no express provision for throwing the one into the other in the 94th section; but the whole is connected together and made sensible, if the 94th section is confined, like the 93rd, to land in the country.

The excepting out of the provisions of the 94th section, cases where the owner has adjoining land, seems well adapted to cases of land in the country, where one property can be thrown into the other, but does not seem well adapted to the case of town lands; and I think that the meaning is that the respective powers of buying and selling “compulsorily,” are not to arise wherever there is adjoining land into which the small piece can be thrown. In such case it was only reasonable that the company should be at the expense of throwing the lands together; and this can only be effected by reading the two sections as connected together, as there is no distinct provision as to the expense of throwing the lands together in the 94th

section; and the 93rd only applies to cases of country land.

It appears to me that the Legislature in these sections was providing for the correlative cases, where the owners require the promoters to purchase, and where the promoters require the owners to sell, and the word "such" properly carries out the intention of confining both clauses to the same subject matter, that is, to property not in a town, or built upon.

It seems to be very probable that the legislature did not in either of these sections intend to meddle with the very valuable property in towns, and I certainly cannot see my way to the conclusion that the legislature has sufficiently expressed the intention to give to the promoters of companies the power of taking, compulsorily, land in towns under the circumstances in question; and I accordingly answer your Lordship's question in the affirmative.

Mr. Justice *Williams* :

I continue to be of the same opinion which I had when this case was in the Exchequer Chamber, and for the reasons there expressed in the judgment delivered by my brother *Willes*.

I think the operation of section 94 of 8 *Vict.* c. 18, is confined to lands not situate in a town, or not built upon, because, according to the ordinary rule prevalent in the construction of the English tongue, the words "such land" have not reference to the heading which precedes both this section and the 93rd; but to the last antecedent, which will make sense with the context, viz., the kind of land described in the beginning of the 93rd section, by the words "not being situate in a town, or built upon."

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Farther, it appears to me that the two sections are manifestly linked together, both by their common language, and by the correlative nature of their enactments. In both sections, "less than half an acre" is made the standard of the size of intersected land, which, in the former, is to give the proprietor the right to compel a purchase by the company, and in the latter, is to give the company the right to compel a sale by the proprietor, who requires a communication. If both sections are confined to lands "not being situate in a town, or built upon," it appears reasonable to apply a common standard of size in both cases. But surely it is unreasonable and unintelligible, if the latter section extends to lands in a town, and to lands built upon, where half an acre may be expected to be of very great value, and the former is confined to lands in the country not built on; where half an acre may be expected to be of very small comparative value.

Again, in each of the two sections, it is made a condition to the right conferred on the proprietor and the company respectively, that the proprietor shall have no other land adjoining the piece that is left. Now, if the intersected land be not in a town, or built upon, it will, generally speaking, be a field, or some similar enclosure; and if the piece left though less than half an acre, adjoins another field, the two may be blended by removing the intermediate fence, so as to form one field, which may, in many cases, be much larger than half an acre. Consequently, after they have been thus thrown together, the piece left by the intersection may *virtually* come to exceed the prescribed extent, and be of greater value than the expense of making a communication, so as not to be within the principle of the enactment. And as such instances may often occur, the legislature may

have thought it right to exclude, generally, the case of an intersected piece of land, where the owner has other lands adjoining it, from the operation of the Act. But this qualification of the right is scarcely intelligible in a case where the railway intersects land that is built on, as the land in towns usually is; and where, consequently, the piece that is left could rarely, if ever, be regarded as fit to be thrown into the adjoining tenement. Yet this qualification is introduced into both the sections. I can, therefore, hardly suppose that the Legislature intended the enactments in the latter section to apply to lands in a town, or built upon, any more than in the former.

Again, the right to compel a sale is given to the company (if a communication is required by the owner) not only in cases when the land left is of less value than the expense of making the communication, but also in cases where it is less in extent than half an acre, notwithstanding it is of greater value than that expense. Where the land is in the country and not built upon (as if it be a field or the like) the value of the piece which is left, if it be less than half an acre, will, generally speaking, if it should exceed the expense of making the communication, exceed it by so small an amount that it is not improper or incongruous to enact that the two predicaments shall be put on the same footing in respect of compelling a sale if a communication is required. But where the land intersected is in a town or built upon, there would, in most cases, be nothing like an approximation between the value of half an acre and the expense of making the communication. Therefore the employment of this measure of half an acre appears to me to demonstrate that the 94th section was not meant, any more than the 93d, to apply to lands in the country which are built upon, or to lands in town, since such lands are usually built upon.

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I may add, that where a railway passes through a mass of houses or other buildings, it would not, I think, be found easy (notwithstanding the interpretation clause enacts that the word “lands” shall extend to messuages, lands, tenements, and hereditaments of any tenure) to apply practically to the buildings so intersected, such expressions of the 94th section as “a piece of land,” “other lands adjoining such piece of land,” and “such severed piece of land;” expressions which are applicable without any difficulty whatever if the operation of the section is confined to lands not situate in a town or built upon.

These and other practical obstacles which would necessarily attend applying such provisions to lands covered with buildings may well have induced the legislature to consider that general enactments of this kind would be unsuitable and inconvenient with respect to that part of any line of railroad that may pass through lands which are built on, and to think it better that it should be left for particular clauses in the special act to meet any difficulties which may occur as to the intersection of this kind of property. Such difficulties cannot be very numerous, and they may be easily foreseen and provided for by particular special arrangements or enactments.

I will observe, in conclusion, that with respect to the unreasonable inconveniences and hardships which, according to the arguments for the Appellants, will be brought upon companies by refusing to extend the operation of the 94th section to towns and lands built upon, and which it is said the legislature never could have intended to exist, those hardships and inconveniences must, in either construction of the section, exist in every case where it happens that the owner of the intersected land has other land adjoining the piece of land left by the intersection.

For these reasons, I beg to answer your Lordships' question in the affirmative.

Mr. Justice *Wightman* :

The question turns upon the construction to be put upon the words "such lands" at the commencement of the 94th section of the Lands Clauses Consolidation Act, 8 & 9 *Vict.* c. 18. Does the word "such" as there used refer to the lands mentioned in the 93d section, or to intersected land mentioned in the heading, or what may be considered as the preamble to the 93d and 94th sections?

The subject matter to which both the 93d and 94th sections are applicable is indicated by the heading or preamble, which is introduced immediately before the 93d section in these terms, "and with respect to small portions of intersected lands be it enacted as follows," and then come the 93d and 94th sections. [His Lordship stated them.]

It appears to me that "such land" in the 94th section is the same as the "lands" in the 93d section, and that the reference in the 94th section is not to the land mentioned in the heading to the two sections, but to that mentioned in the 93d. According to the ordinary construction of language the reference would be to the last antecedent, and there is nothing in the apparent object of those sections which would require a different construction from that usually adopted. Both sections appear to me to apply to the same kind of land, that is, land in a town, or not built upon; but that under the 93d section in the case there contemplated, *the owner* may compel the promoters to purchase the small piece if he has no adjoining land into which it can be thrown; and that under the 94th section, in the case there provided for,

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the promoters may either make a communication or buy the land at their option; and that neither of the sections applies to land situate in a town or built upon. And I therefore answer your Lordships' question in the affirmative.

Lord Chief Baron *Pollock* :

Lord
 Chief Baron
 POLLOCK.

My Lords, the question in this case is, whether the 94th section of 8 & 9 *Vict.* c. 18, having the expression "such land" at the commencement, is to be construed to mean the land in the heading or preamble of the two sections, or the land mentioned in the beginning of the 93d section.

*The ground upon which the latter view is sustained, is chiefly that the rules of grammatical construction require such an interpretation to be put on the Act of Parliament. Grammar may, no doubt, sometimes render assistance to law by helping to the construction, and thereby to the meaning of a sentence; but grammar, with reference to a living, and therefore a variable language, is perhaps more difficult to deal with than law, and the rules of legal construction are far more certain than the rules of grammatical construction. To resort to grammar where law fails is frequently, I think, to decide "*ignotum per ignotius*;" and it is remarkable that on more than one occasion there has been on the bench a difference of opinion, and for each opinion the rule of grammatical meaning and construction has been relied upon. The very case before your Lordships is an example. With reference to the manner in which *this* Act is framed, not by a train of consecutive clauses, but by sets of clauses, each referring to a particular subject, in my judgment the rules of construction, whether of grammar or good sense, require "such land" to be referred to the heading, and

not to the previous section. "Such land" being, as I should construe it, the land with reference to which the clause is introduced.

The introductory phrase or heading of the two clauses is, "with respect to small portions of intersected land, be it enacted," and then comes the 93d section. The ordinary introductory words of a clause, "*be it enacted*," do not occur in either section; they are found in the heading only, which induces me to think that the two clauses are *separately* enacted as to the subject matter of *both*, without any reference to each other, unless such reference is created by words expressly importing it. As was remarked by Lord Chief Justice *Erle* in the Court below, the last preceding antecedent land, is "land adjoining," and not "*land not situate in a town*." The heading refers only to these two sections; if both of them refer to "*land not situate in a town*," the heading should have been different; it should have been, "and with respect to small portions of intersected land (not being situate in a town, &c.);" again, the 93d section refers to land (not being situate in a town or built upon) so cut through and divided by the works as to leave either on both sides or on one side thereof a less quantity of land than half a statute acre, &c.; the 94th section refers to land so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre; repeating a portion of what is contained in the 93d section (which would have been superfluous if *such* land meant the same land as was referred to by the 93d section), and omitting the description of (not being situate in a town, &c.). I think what was omitted was intentionally omitted, and that the two sections refer the one to one description of land and the other to another description of land; the first to intersected land not in a

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town, the second to intersected land whether in a town or not, and I think this is the most reasonable construction, taking both grammar and good sense into consideration.

It must on all hands be admitted that, both in writing and speaking, the antecedent really referred to is often to be made out by the good sense of the hearer or reader rather than by the position of a word in the sentence; frequently the actual last antecedent would make nonsense; and it seems conceded that you must then go back to some other antecedent, and a curious question may be raised as to the degree of absurdity and injustice which may be tolerated before referring back to an earlier antecedent.

The *judicial* exposition of any document ought to be the *reasonable* one, and not emphatically the grammatical one; here, however, I think, grammar and good sense do not differ, and I am of opinion that the operation of the 94th section of 8 & 9 *Vict.* c. 18, is not confined to lands not situated in a town or not built upon.

Lord Chief Justice *Erle*:

Lord
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My answer to your Lordships' question is in the negative. In support thereof I beg to refer to my judgment below, and I offer farther observations on the arguments here.

The arguments for restricting the section to land in the country were drawn, first, from the meaning of the word "such" at the beginning of the section. Secondly, from the danger of companies speculating in land valuable for building purposes; and, thirdly, from the correlative correspondence between sections 93 and 94.

With respect to the meaning of the word "such," even if the grammatical rule be adopted in law, it is controlled by the context, for in the judgment below, "such" was

declared to refer to “the next antecedent which will make sense with the context.” If the rule for proximity of reference is to be regulated by the sense of the context the construction in effect depends on “the sense of the context.”

I would observe farther that this word, from the nature of the statute, recurs frequently in a peculiar sense. All the clauses are only provisionally operative; that is, in case they should be incorporated with some future Act. When the statute passed, it related to no land at all, but if incorporated with another Act it would relate to *such* land as should be within the operation thereof. The framer of the Act intended to save waste of words by preparing clauses for adoption by incorporation instead of repetition. He has disposed of many complicated rights and liabilities with powerful forethought and appropriate language, and the frequent use of the word was required by the subject matter. Thus, where land is first introduced by section 6, it is properly described to be “land by the special Act authorised to be taken, and which shall be required for the purposes of such Act;” the repetition of this description would be of perpetual recurrence, were it not saved by making “such” refer to it. Also the division of the statute under separate headings has occasioned another very frequent use of the word to refer to the heading; and if the statute be considered as a whole, in construing section 94, I submit that the word “such” in its commencement cannot be relied on to show that the section is not to apply to land in a town, but that the construction ought to depend on the purpose of the clause, to be gathered from the context.

If the construction is made on this principle, I submit that the purpose of saving companies from extortionate waste is in reason as applicable to town as to country.

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The notion that the legislature intended to save companies from speculating in valuable land seems extremely improbable. If companies buy, the price is enhanced for an unwilling seller, it was said, to the extent of 25 per cent. above the common value. It would be absurd to buy on such terms, with a certainty of being obliged to sell at any price that could be got within ten years. The option of so buying could only be exercised where the owner required a bridge. If the directors intentionally speculated, they would incur serious liability for misapplying their powers; and, lastly, it would be unjust to deprive all companies of reasonable protection, for the sake of saving some few companies from unreasonable imprudence.

With respect to the argument from the correlative correspondence of the two sections, I submit it has no reality; the notion, that *where* the owner may force the company to buy, *there* the company may force the owner to sell, may sound probable, but in sense it is inconsistent. The object of each section is entirely distinct. By section 93 the owner may compel the company to buy rural land, because an isolated patch may be a waste for agricultural use. By section 94, the company may compel a sale of an isolated patch, rather than make a bridge to it; the motives to sway the options in the two cases have no more correspondence with each other than a plough has with a bridge; and because the legislature confined the relief for agriculture to the country, there is no coherence in saying, that for the same reason it should confine relief from waste in bridges to the country also.

On these grounds, I am of opinion that the question should be answered in the negative.

The Lord Chancellor (*Lord Campbell*):

The only question in this case is, whether the word “such” in the 94th section of 8 & 9 *Vict.* c. 18, refers to the words “lands not being situate in a town or built upon” to be found in the beginning of the 93d section of this Act, or refers to the heading which is prefixed to these two sections, “and with respect to small portions of intersected land.” The question does not depend on any general principle of law, but on the meaning of the legislature in the use of language never introduced into an Act of Parliament before, and not likely to be repeated in any subsequent Act of Parliament. Unfortunately neither construction produces a result by any means satisfactory; so that we cannot decide upon the rule that where the language of an Act of Parliament is equivocal, the legislature must be supposed to have intended to enact that which is reasonable.

I do not think that any of the authorities which were cited on either side can assist us, or can be commented upon with advantage.

The leaning of my opinion is with that of the learned Judges who answered the question submitted to them by your Lordships, in the negative, and I would advise your Lordships that the judgment of the Court of Exchequer Chamber be reversed.

Lord Wensleydale:

I am not surprised that such a difference of opinion should prevail among the learned Judges as to the construction of the 94th section of the Lands Clauses Consolidation Act, 8 *Vict.* c. 18, both in the Courts below and in your Lordships’ House, for the framer of the clause has not expressed himself so clearly as he ought; and in endeavouring to avoid the usual prolixity of the language

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of Acts of Parliament, has fallen into the very common consequential fault of being somewhat obscure. In drawing the two clauses so as to be applicable to all cases, he has probably not had present to his mind all the cases that might occur.

The Judges who take opposite views of the 94th section, are not wanting in reasons of considerable weight on each side. I have considered their judgments in the Court below, and their opinions given to your Lordships, with much attention; and have arrived at the conclusion that the construction put on the Act by the minority is correct, and that the judgment of the Court below should be reversed.

The first and most important question upon which I think the decision of the case mainly depends, is to what antecedent the word "*such*" in the 94th clause is to be applied. Everyone must agree that we ought to construe the clause according to the ordinary grammatical rules; and farther, that according to those rules, the word must, *primâ facie*, be taken to apply to the last antecedent.

What, then, is the last antecedent? If these clauses were written together, consecutively, without breaks, without a heading belonging to both, the next antecedent would be the words adjoining "*land*" (not lands in the plural) not situate in a town or built upon; but as that would be insensible, the reference must be intended to be to the next antecedent which would make sense, and the words in the beginning of the 93d section, "lands not situate in a town or built upon" would be the next antecedent.

But I am of opinion that an Act penned as this is, cannot be read as a continuous enactment would be; various clauses relating to each separate subject are col-

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lected under various heads, with an appropriate heading to each class, which must apply to the whole of that class to which it is the heading, and the meaning of this heading, "and with respect to small portions of intersected land, be it enacted as follows," is equivalent to saying, that all the enactments or sections of the statute contained under that head relate to small portions of intersected land, and they must, therefore, be construed so to relate. The effect is the same as if, as my brother *Channell*, in his able argument has observed, the heading had been repeated, as it would have been in the more prolix form which prevailed in older statutes, at the head of each section. The 94th section might, therefore, be read as if it had the heading at length. "And be it farther enacted, with respect to small portions of intersected land, that if any such land shall be cut through and divided so as to leave on either side a piece of land less than half an acre, &c., the promoters of the undertaking might require the owner of the small piece of land to sell it to them," which seems to make good sense.

On this supposition, which I am quite satisfied is the right one, the next antecedent is to be considered as being "small portions of intersected land;" and the 94th section is to be taken to apply to lands so intersected both in towns and lands built upon, and those not in towns and not built upon. Each case likely to occur in the construction of railroads is then provided for, which it was evidently the intention of the legislature to do by a general Act, in order to save trouble and expense. On the other hand, if the construction be that the 94th section applies only to lands not in towns, and not built upon, it would leave the case of such land wholly unprovided for, which it is impossible to suppose could have been the intention of the legislature. It leaves also

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the companies liable to make a connexion between one part of the several lands in a town and another, however great the expense of making it might be, and however trifling the value of the parts severed. A construction which leads to such consequences ought never to be adopted, and that which appears to me to be the right one, according to the plain sense of the enactment, and avoids such results, ought to be preferred. The 93d section provides a remedy for the proprietor to compel a purchase by the company from him. The 94th section gives to the company the power to compel a sale of small pieces of land in both town and country in the cases provided for by those sections.

But it is urged by those who object to this construction, that the provisions in both the sections are very reasonable, if confined to lands not in a town or built upon, and very unreasonable, if extended to lands in a town or built upon; and, that, therefore, they should be construed to apply to the former only. This is a part of Mr. Justice *Williams's* able opinion. It is said that half an acre in a town, or land built upon, may be of very great value, if compared to lands in the country where half an acre may be supposed to be of very small comparative value. I must own that I am not much impressed by that argument. One half acre in the country may differ exceedingly in value from another. It may be of barren moor land, not worth a shilling an acre, or of meadow or pasture; or land under very profitable cultivation may be worth 10*l.* or 20*l.* an acre. In declining or deserted towns, half an acre covered with old buildings which, to make the land worth anything, would have to be removed, may be of very little value, but in prosperous localities it might bear a high price. These differences make no difference in principle; the legisla-

ture chose to make general rules applicable to all cases of severance.

Perhaps it might have been said that the statute ought not to have made the size of the disconnected piece any criterion at all when the value of it was so various, but ought to have made the value the sole criterion. But the statute, perhaps for wise reasons, has not adopted value for the criterion, because that might have led in every case to a dispute, and a valuation which could not be made generally without the aid of professional men, and this great expense might have been incurred by both the promoters and the claimants; but if size alone were made the criterion, there would never be any dispute that could not be easily and inexpensively settled, and this great advantage might have been considered on the whole as a very good reason for adopting the provision which the statute contains.

Nor do I think that the circumstances also mentioned by Mr. Justice *Williams*, that in towns and lands built upon, the piece left could be seldom capable of being thrown into the adjoining tenement, warrants us in holding that such land was not meant to be included in the 94th section.

It would probably be of very unfrequent occurrence, but still it might occur occasionally; and it is very reasonable to suppose that the legislature would provide for all possible cases.

The natural construction of the words of this Act of Parliament, divided as it is in groups of sections, with headings to such sections, being such as I have said, I think that both the sections in this case applied to all intersected lands, and there is clearly nothing so unreasonable in that construction as to call upon us to alter it; all is perfectly consistent.

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The criticism made by Mr. *Mellish*, in his very able argument at your Lordships' bar, on the use of the word "such" in so many similar cases in this Act of Parliament, confirms the view now taken of the true construction, though I think it was hardly required.

I think, therefore, that I ought to advise your Lordships to reverse the judgment, and give judgment for the Appellants.

Lord *Cramworth* :

I have nothing to add in this case, but that I concur with my noble and learned friends who have already expressed their opinions. The truth is, that what we have to do is to interpret the language of the Act of Parliament, and to say what is the meaning of certain sentences which, strictly speaking, can hardly be said to have a sensible meaning. For you cannot get out of the difficulty by saying that the word "such" applies to the last antecedent; that would not be quite sensible. Neither can it be strictly applied to the heading, because the words in the heading are "intersected lands." Therefore, that will not do. That is not exactly the way in which "such" is used; so it appears to me, though my noble and learned friend does not feel the force of that reasoning; but at the same time I quite concur in the result, that the construction which my noble and learned friend on the wool-sack and my noble and learned friend opposite have put upon this section is, upon the whole, the most rational one, and the one which we ought to adopt.

Lord *Chelmsford* :

The great diversity of opinion which has prevailed amongst the learned Judges, whose assistance your Lordships have had in this case, prevents my feeling any very

great confidence in the conclusion to which I have arrived. Bnt, having carefully weighed the reasons which they have assigned for their different opinions, I have been enabled to determine satisfactorily to my own mind which construction of the Act seems best to correspond with the intention of the legislature. The context upon which the interpretation depends is confined within the narrow limits of two sections. And the construction would appear to be aided by these being connected together as to their subject matter by a common heading, according to the convenient mode by which the different provisions of the Act are distinguished from each other. But this circumstance, which might be supposed to be favourable to the correct construction of those two sections, has, on the contrary, proved to be an impediment to it.

The formal scheme of the Act being that which I have described, and the legislature, having disposed of various matters under their appropriate general heads, arrives at the 93d and 94th sections, and prefaces them with a declaration that it is about to deal with the cases "of small portions of intersected land." The plan of dividing the Act into separate headings would lead us here to expect that the legislature was about to make provision for cases of this kind generally, and was not intending to confine itself to land of a particular description, viz., to "land not situate in a town or not built upon." If the sections in question are both of them applicable to land of this local or peculiar character and to no other, then the heading in the generality of its form is only calculated to mislead; for it ought to have contained the qualifying expressions which it is said must be taken to run throughout the enactments of which it forms the introduction. I advert to this not as by any means conclusive, but merely to show my impression that there is something like a

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primâ facie presumption, to be gathered from the heading, in favour of the larger over the qualified construction of the 94th section.

I think that too much stress has been laid in the argument upon the word "such" which it was shown has been employed in various parts of the Act without much regard to propriety, or to its supposed relative force. Many of the learned Judges deal with it as if it were a settled rule of construction that it should be referred to the last antecedent. I am not aware that this is a word of such close relation that it must necessarily refer to the next immediate antecedent, like the word "*idem*" which (as I pointed out during the argument) Lord *Coke* says (i) "*semper proximo antecedente refertur.*" At the same time it must be admitted that every relative ought to be referred, not perhaps to the next antecedent "which will make sense with the context," but to that to which the context appears properly to attract it. Applying this rule upon the present occasion, it will appear that the word "such" cannot refer to the last antecedent "adjoining land;" nor to the one next preceding "other land required for the purposes of the special Act;" nor, if strict grammatical propriety is to be regarded, to the words "lands not being situate in a town or built upon;" because "such land" in the singular would not be a correct relative to the antecedent, "any lands," &c., in the plural. We are thus carried back to the heading in which we find the word "land" in the singular, and so far, therefore, having the requisite of a correct antecedent to a relative also in the singular. But then, if we bring this antecedent to the test (as proposed by my noble and learned friend near me), by substituting it in the 94th section for its assumed

(i) Co. Litt. 20 b.

relative, we find that the language could not be accurate. For the enactment would then run, "If any small portions of intersected land shall be so cut through and divided," &c., which would not convey the intended meaning; for it is not the small portions of land which are cut through and divided, but the lands generally, which by being cut through, &c., leave the small portions of land on either side, or on both sides of the works.

This minute examination of the language of these sections may perhaps lead fairly to the conclusion that the word "such" has been inserted in the 94th section without much regard to its effect. At all events it shows that there is nothing in the use of this word, as a word of reference, which prevents our giving full effect to the generality of the heading, if it is not opposed to the context.

This, however, has been strongly asserted to be the case. It is said that the word "small" is a word of comparison, and that in a town it might represent a considerable fortune. But, in answer to this, it must be observed, that the legislature by the word "small," clearly means small in extent and not of small value, and the definition of what shall be considered small in extent is marked in both the sections by the words "less than half an acre."

It is not improbable that the legislature, in the 94th section, intended that the land should, in all cases, be of less value than the expense of making a bridge or other communication, because the words at the end of the section are general; that "on the occasion" (*i.e.* on every occasion) "of ascertaining the value of the land, the jury shall, if required by either party, ascertain the value of any such severed piece of land, and also what would be the expense of making such communication." But this indication of intention is not sufficiently plain to

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warrant the change of the alternative expression by reading “or” as “and.” Nor do I think that this is at all necessary to establish the construction which I have adopted.

The two sections in question appear to be framed with the object of protecting the landowners on the one hand and the promoters of the undertaking on the other. In the 93d section the interest of the landowner is alone regarded, and power is given to him to compel the promoters of the undertaking to purchase intersected land of less extent than half a statute acre, unless he has land adjoining into which the land which is left can conveniently be thrown. In the 94th section care is taken that the promoters of the undertaking shall not be prejudiced by an unreasonable enforcement of the rights of the landholder under the 68th section of the Railway Clauses Consolidation Act. If the landowner require the communication between the intersected land to be made, where the piece of land left on either side of the works is of less value than the communication, the promoters of the undertaking may compel him to sell. Why should not this apply to land in a town as well as to rural land? The object of it is to prevent unreasonable demands being made upon the promoters of the undertaking; of enabling them to tell the landowner, if he insists upon having communications which would cost more than the value of the land, that they will buy him out. At the same time, if the land is of high value, it is not very probable that the promoters will adopt the alternative of purchasing at what would be likely to be an exorbitant price, knowing that they could not employ it for building purposes, the only use to which it might be applicable, and with the knowledge also that they would

be compelled to sell it again within ten years, or to suffer it after that period to vest in and become the property of the owner of the adjoining lands.

It has been remarked, that in the two sections there is the same qualification to be found as to the owner not having other lands adjoining to the land divided; and this has been relied upon to prove that the two sections are applicable to the same lands. But I think that an argument is to be derived from the language of the sections in this respect in an opposite direction. In the 93d section the owner of the land is not permitted to compel the promoters of the undertaking to purchase if he has land into which the piece of land left can be thrown so as to be conveniently occupied therewith; because he is sufficiently protected in such a case by the power which he has to compel the promoters at their own expense to throw the lands together. In the 94th section there is no such provision as to throwing the land together; but the promoters of the undertaking are not empowered to compel a sale when the landowner requires the communication to be made "if he have other lands adjoining such piece of land;" because to take away a piece of land from the contiguous lands might, in the case of building land, entirely destroy the profitable employment of the land to that purpose, and in other cases which might easily be supposed might occasion an injury far beyond the value of the land so taken away.

There is much weight in favour of this construction in the observation of Lord Chief Justice *Erle* in the Exchequer Chamber, that "it is probable that the power of compelling a sale is most needed in a town, as the land in a town is more often held in small portions, so that there might be many severances in a small space, and each might require a bridge for himself."

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Taking, therefore, the heading and the language of the two sections together, the former appears to me to require something beyond a particular and limited description of land as the subject to be dealt with; and the latter is capable of an interpretation which will fully meet the intention, and make the 94th section applicable to cases where it may be most important and necessary.

For these reasons, I think that the judgment of the Exchequer Chamber is wrong, and that it ought to be reversed.

Judgment reversed.

Lords' Journals, 3 August 1860.

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 {
 June 28.
 July 6.
 August 3.
 —
Contract.
Terms of
Letting.
Statute of
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Judgment in
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Practice.

The Hon. F. FITZMAURICE - *Appellant.*

Sir JOHN BAYLEY, Bart. - *Respondent.*

One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statute of Frauds; but where the first paper was in these words, "I agree to let the premises in *G. L.*, containing, three stables, &c. for the same rent and subject to the same conditions that I hold them myself;" it was held (Lord Campbell, Lord Chancellor, *diss.*) that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the statute.

In the Court of Queen's Bench, in an action on an agreement, the questions discussed were, one of fact, what the parties had said and written to each other, and one of law, what was the construction to be put on two letters of the Defendant, which were relied on as a ratification of what his agent had done. In the Exchequer Chamber (upon the proceeding by appeal under the Common Law Procedure Act), the judgment of the Court was given on the

ground that even if the Defendant's letters amounted to a ratification, it was null, for that the paper ratified did not contain a memorandum of agreement sufficient to satisfy the Statute of Frauds :
Held, that it was competent to the Court of Exchequer Chamber to adopt that ground for its judgment.

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THIS was an appeal under the Common Law Procedure Act against a judgment on the discharge of a rule for a nonsuit.

Declaration on an agreement to which the Defendant pleaded the general issue and several special pleas. The former alone is material. The cause was tried before Lord *Campbell* at the *Middlesex* sittings after *Hilary* Term 1856, when it appeared that the Plaintiff, Mr. *Fitzmaurice*, was possessed of a lease from *December* 1850, for nine years and three quarters, of certain premises called *Hamilton Lodge*, situate at *Kensington Gore*, in the county of *Middlesex*, and also, under a different landlord, of another lease for five years, of stables in *Gore Lane*, 300 yards distant from the former premises. Negotiations for a sale of the lease and furniture, &c. of *Hamilton Lodge* were entered into, which were chiefly carried on by letters; a Mr. *Rearden*, a house agent, acting in these negotiations as agent for the Defendant. The parts of the letters material to be considered in this case were the following:—There was a letter from the Plaintiff to Mr. *Rearden*, which bore no date, but was said to have been written on the 30th *August* 1855, and which contained a statement of the proposed terms and a list of the things to be taken, the whole amounting to a sum of 800 *l.* One sentence was in these words, “And for the furniture as it stands, on view, *ornaments*, &c. mentioned, not included, 490 *l.*” This letter was addressed to Mr. *Rearden*, and was given to him, but was intended for the Defendant's perusal. The letter did not contain any mention of

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the stables in *Gore Lane*, but the Plaintiff gave evidence that they formed part of the subject of conversation between himself and Mr. *Rearden*. The Plaintiff also stated that Mr. *Rearden* brought him back this letter in the evening of the 30th *August*, and said that the terms it contained would not suit the Defendant, and the Plaintiff said he would send a final proposition in the morning. The Plaintiff, accordingly, on the following morning, addressed a letter to Mr. *Rearden* in these terms:—
 “*Hamilton Lodge, 31 August 1855. As Sir John Bayley declines my proposition that he should take every thing as it stands for 800 l., sooner than let the thing fall through, I am content that it should go by valuation. I am therefore prepared to accept Sir John Bayley’s proposition for him to pay 100 l. premium for the remainder of the lease of this house for five years, he paying the annual rent of 180 l. by quarterly payments, and all rates, taxes, &c., from the 29th September 1855. I farther agree to his proposal that the whole of the furniture and fixtures are to be sold by valuation; Mr. Snell to value for me; Mr. to value for Sir John Bayley. I farther agree to let Sir John Bayley the premises in Gore Lane, containing three stalled stables, coach-house, servants’ room, and loft, for the same rent and subject to the same condition (a) that I hold them myself; and I acknowledge to have received the sum of 50 l. from Sir John Bayley this day as part payment of the 100 l. premium and as an earnest of his carrying out these propositions. The furniture, fixtures, and the remainder of the premium to be paid for on Sir John Bayley receiving his agreement signed by me.*”

(a) There was much discussion whether this word was condition or conditions.

This letter was, as the Plaintiff alleged, read to Mr. *Rearden*, and handed to him, and he then handed to the Plaintiff a cheque of the Defendant for 50 *l.*, and took from the Plaintiff the following receipt:—

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“ *London, August 31, 1855.*

“ Received of Sir *John Bayley*, per Mr. *Rearden*, by cheque, the sum of 50 *l.* as a deposit and part payment of the sum of 100 *l.* for the lease of *Hamilton Lodge*; the furniture and fixtures to be taken by Sir *John Bayley* at a valuation, in accordance with my letter of date 30th *August.*”

On the 14th *September* Mr. *Rearden* communicated to the Plaintiff that the Defendant would not take the stables in *Gore Lane*. A dispute arose between them, as to whether the above letter had been read to Mr. *Rearden*, and some high words passed. The Plaintiff thereupon wrote to the Defendant the following letter:—

“ Sir, *Hamilton Lodge, September 14, 1855.*

“ I regret to have to trouble you *personally* on a subject of consequence; but, after the insolence of Mr. *Rearden*’s conduct this morning, and his prevarication, I might be prepared for anything, but I certainly was not prepared to find (if what he states be true) that my letter of the 31st *August* last, accepting your proposition to me, has never been forwarded to you up to this date.

“ I enclose copies of the same. I shall feel obliged if you will inform me if this be the case, and, if so, all farther comment on Mr. *Rearden*’s conduct is unnecessary, as I should think this is an unheard-of thing, even in all the looseness of agencies.

“ I hope that, between two gentlemen, there can

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be no possible difference of opinion as to your carrying out the proposition made, under your sanction, by your own agent.

“ You will see, by your proposition of the 30th *August*, that it required an *immediate* answer ; I therefore gave my acceptance to Mr. *Rearden*, personally, at his own office, on the 31st *August*; *I read it over to him myself*, and thereupon received a cheque from you in earnest of *the whole thing* being carried out. On taking my receipt, Mr. *Rearden* offered me a written acceptance of the agreement. I told him your cheque was sufficiently binding. The stables were inserted at Mr. *Rearden's express desire*, as he said you had six or seven carriages, and would certainly want them. I have refused another party who required them, and there are no others to be had this side of *Kensington* turnpike, which I conceived to be an object to you.

“ This morning Mr. *Rearden* brought a letter from your solicitors wishing for an assignment of the leases. I will inquire of my solicitors if there is anything to prevent your having an assignment of the lease of this house, but as it was proposed taking the stable for five years only, I cannot give you an assignment of my lease for seven.”

Inclosed in this letter were copies of Mr. *Rearden's* letter to Plaintiff of the 30th *August*; and the Plaintiff's letter to him, dated 31st *August*.

The Defendant, on the 15th *September*, wrote a letter to the Plaintiff, in which he said :—

“ I have not heard one word from him [the agent], or any one else, about *Hamilton Lodge*, since this day fortnight, when I left *London*, and yours received this morning is the first and only letter I have had on the subject;

I am therefore entirely ignorant of all that has occurred since; but of this you may be assured, that I shall not uphold Mr. *Rearden* in showing the slightest disrespect or incivility to you, and shall be very sorry if anything of the kind has occurred.

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“In answer to your inquiry, whether your letter of the 31st of *August*, accepting my proposition, has ever been forwarded to me, I beg to state that on the evening of that day, being the night before I left town, he called and told me the business was arranged, and showed me a letter of that date, which I took to be your writing, which is in substance very much like the copy you have sent; but, speaking from memory, I do not think it is quite like. In the one I saw, I think there was some exception as to what was to be sold by valuation. One word was ‘*ornaments*,’ but it was followed by another word which none of us could read, and I have no recollection that there was anything in it about the stables in *Gore Lane*. Indeed, until I received your letter this morning, I had no idea that there were any other stables but the two-stall stable adjoining the garden of the house, and so fully impressed was I with this idea, that since I have been at *Cowes* I have been endeavouring to make an arrangement for keeping some of my horses in the country, so that I might be able to do with two only in *London*, changing horses occasionally.

“Whether I read the letter, or Mr. *Rearden* read it to me, I cannot remember, though I rather think I read it myself, because I recollect being puzzled at the word I have before alluded to; however, whichever it was, I returned it to Mr. *Rearden*, and told him to keep it, and I suppose he has it; and whatever it is, it will speak for itself, and I am fully prepared to carry it out. I beg you will not think another moment about the piano, but

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do exactly as you like, for I don't want either of them; and, if I had my choice, I should rather take one than two, as I have a very good one of my own."

On the 17th of *September* the Plaintiff wrote to the Defendant saying, among other things:—

" I think the agreement you refer to was that in which I offered to leave everything as it stood for 800 l., excepting the ornaments, *pictures (b)*, various musical instruments which I had in the house, such as guitars, violoncello, small organ, and *pianoforte in the drawing-room*, which was a gift to my wife.

" You ought to have received the last agreement on the *Friday* morning before you left town, as I received your check *after* I had read the agreement over to Mr. *Rearden*, and placed it in his hands. It was thus drawn out because Mr. *Rearden* told me *you would require the stables*, and I felt confident you could not be comfortable here without them, as I originally stated to Mr. *Rearden*, because there is no room for a servant over the stables, and the coach-house is inconveniently small, as you may have seen, independent of being obliged *to put-to* in the public road.

" I am satisfied that you will not have been here a week before you will find that you could not do without them, so I will say no more on the subject."

The Defendant, on the 18th of *September*, wrote a letter to the Plaintiff, containing the following passages:—

" With reference to the agreement, under which I was to take *Hamilton Lodge*, I could not say, from memory, when I wrote to you before, nor can I now, whether it was the one of the 31st of *August*, of which you sent me

(b) The phrase proved to "ornaments, &c. mentioned."

a copy, or whether it is some other ; though, for the reasons which I have stated to you, I thought, and still think, I did not agree to take it on the terms stated in your letter of the 31st of *August*; and, farther, that I never saw that letter until last *Saturday*, when you sent me the copy. I am the more confirmed in my belief, that my agreement was not that contained in your letter of the 31st of *August*, from a letter which I received from my lawyer last evening, in which he informed me that there was some difference between Mr. *Rearden* and yourself about the stables in *Gore Lane*, and inquiring of me how he should act, and in his letter he sent me a copy of your receipt, which is as follows." [It was here set out.]

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" You will not fail to observe that the dates of these letters do not correspond, one being the 30th and the other the 31st of *August*, and the terms expressed in this receipt are exactly those which Mr. *Rearden* mentioned to me, and he mentioned no others. The agreement, however, whatever it is, or whatever its date, Mr. *Rearden* has, and, as I observed in my former letter, it will speak for itself, and whatever it is I shall carry it out.

" With respect to the authority which I gave Mr. *Rearden*, after his telling me that he had got me *Hamilton Lodge* on the terms of paying 100 *l.* and taking fixtures and furniture at a valuation, I left everything *else* to him, desiring him to do the best for me he could, and to consult your convenience as far as possible, but that it would suit me best to have possession at Michaelmas. What he has done for me I do not know, as I have not heard from him or written to him since I left town ; but, of course, I must support him in all he has done for me, except his showing any incivility or disrespect towards you. Having thus left everything to Mr. *Rearden* as my agent, and being in ignorance of everything he has

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done, except what I learn from your letters and my lawyers, I do not think I should act rightly if I were to interfere with any arrangement which he has made, or with any differences which, unfortunately, exist between you, until I hear his side of the question. Until I got my lawyer's letter last evening, I could not understand what the difference was about the *Gore Lane* stables; but now I see the question is, whether they are included in my agreement or not; and, in answering your first letter, I did not think I was encroaching on Mr. *Rearden's* authority in saying that the agreement which he held would decide the question. The difference about the pianofortes I did understand; and, considering *that* the main point of dispute between you, and wanting neither of yours, but at the same time preferring to take one than two, which was all you asked, I ventured, on my own authority, so far to interfere with Mr. *Rearden*, without consulting him, as to settle that question without reference to him. But, in my present state of ignorance, I do not think it fair towards Mr. *Rearden* to go farther than this, without communicating and consulting with him, and hearing what he has to say.

“ I trust that you will see the propriety of my continuing to act through him, whilst I am responsible for what he does, and until I hear from him what he has to say in defence of the conduct which he has pursued.

“ With respect to my taking the stables in *Gore Lane*, that seems to me to depend upon two questions:—First, whether they are within the agreement under which I am to take *Hamilton Lodge*, and, if they are, I must of course take them, whether I like them or not, though I must say that, if I had known anything about them, I should certainly have gone to see them before I agreed to take them, and most assuredly should have inquired

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about the rent, which I never learnt until I received my lawyer's letter last evening, in which he mentioned that the rent was 40 *l.* a year. Secondly, if they are not, I must claim the privilege of seeing them, and deciding for myself, before I give an answer. If they are good stables, and such rooms over them as I should expect a good servant to be satisfied with, and I would not put a servant into a room I would not occupy myself, I have no doubt I shall be but too glad to take them; but if I found they did not answer these purposes, and were obliged to take them, I should let them, and get others elsewhere.

“ If it is found that my agreement does not comprise these stables, you will perhaps be kind enough to keep your offer of them open to me until the 29th, when I shall have an opportunity of seeing them, or my coachman will, and reporting to me, and then I will give you an answer at once.”

There was then an explanation relative to going into possession on the 29th *September* :—

“ I forgot to mention that I wrote to my lawyer last night, in answer to his letter received a few hours before. to say that I was not aware that the *Gore Lane* stables were included in my agreement, but that Mr. *Rearden* had it, and that, if they were included it, to proceed to carry it out as regards the stables, and at all events as to *Hamilton Lodge*, and I have no doubt he will do so forthwith.”

The Plaintiff, on the 19th *September*, wrote to the Defendant:—

“ The difference in the dates between the receipt and the agreement is simply this, that *your proposition to me* came through your agent on the NIGHT of the 30th *Aug^t*; and he, requiring an *immediate* answer, I wrote

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my answer (enclosed to you) on the night of *August 30*. I gave it to Mr. *Rearden* on the morning of the 31st, having *read* it over to him *previous* to signing the receipt, which was drawn out by Mr. *Rearden*, and not by me."

"I think it right to mention, that there were but two agreements, one to take every thing for a sum of money, which you rejected, and then made a counter proposition to me to take things at valuation.

"The stables were inserted in the latter at Mr. *Rearden's* request, who said you had so many carriages and horses *that you must have them*.

"It was of course impossible for me to do otherwise than give them up to you, as I conceived Mr. *Rearden* was speaking the truth."

At the close of the Plaintiff's case, it was contended on the part of the Defendant, that the general issue was not proved, inasmuch as no evidence had been given of the contract stated in the declaration sufficient to satisfy the provisions of the fourth section of the statute of frauds. The *Lord Chief Justice*, however, would not stop the case, and the Defendant then gave evidence to contradict the representations of what had occurred in the conversations between the Plaintiff and *Rearden*. The Defendant stated that he went over the premises on the 29th with *Rearden*, that stables in *Gore Lane* were mentioned to him by *Rearden*, and that he said he did not require them, that they were not mentioned again to him, and that he never heard of them till he received the Plaintiff's letter of the 14th September. *Rearden* stated that he told the Plaintiff, on the 30th August, that the Defendant did not want the stables in *Gore Lane*: and that the letter of the 31st August was brought to his office and left with the words, "This is what we have agreed to," and that he (*Rearden*) received the letter but never opened it or showed it to the

Defendant, or knew its contents till the 14th September following.

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The *Lord Chief Justice* ruled, upon the evidence on both sides, that Mr. *Rearden* had no prior authority from the Defendant to take the *Gore Lane* stables, and that the question for the jury would be, whether he did in fact enter into this contract, contained in the Plaintiff's letter of the 31st of August, including the *Gore Lane* stables. His Lordship also ruled that there was a sufficient subsequent ratification, by the Defendant, of the agreement of the 31st of August, and that there was a sufficient memorandum of this agreement within the statute of frauds; but this latter point he reserved.

The jury found that *Rearden* had in fact entered into the agreement which included the stables in *Gore Lane*.

Leave to move to enter a nonsuit was given, and a rule having been obtained for that purpose, it was afterwards discharged "Mr. Justice *Crompton* not concurring" (c).

The case was then carried into the Exchequer Chamber, where the judgment of the Queen's Bench was reversed (d).

The judges were summoned, and Lord Chief Baron *Pollock*, Mr. Justice *Wightman*, Mr. Justice *Crompton*, Mr. Baron *Bramwell*, Mr. Justice *Byles*, and Mr. Justice *Hill* attended.

Sir *H. Cairns* and Mr. *Badeley*, for the Appellant:

There was a sufficient contract here signed by the agent. Two pieces of paper may be connected together to constitute one contract, *Hammersley v. De Biel* (e), *Ridgway v. Wharton* (f); there may even be a sufficient acknowledg-

(c) 6 Ell. & Bl. 868. *

(e) 12 Clark & F. 45.

(d) 8 Ell. & Bl. 664.

(f) 6 H. L. Cas. 238.

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ment of an unsigned contract made by a writing intending to get rid of it, *Shippey v. Derrison* (*g*), where Lord *Ellenborough* said, “anything under the hand of a party expressing that he had entered into the agreement will satisfy the statute, which was only intended to protect parties from having parol agreements imposed upon them.”

A suit for specific performance may be maintained, even though all the particulars, as, for instance, the date of the commencement of a lease, are not stated. *Pym v. Blackburn* (*h*). It was not necessary, therefore, as supposed in the judgment in the Exchequer Chamber, that the period for which the stables in *Gore Lane* were to be let, should be expressly stated. The question on the statute of frauds is, whether the terms are sufficiently stated in writing. They were so here. They were “the conditions on which I hold;” those conditions were contained in a lease, and the contract was for the assignment of the lease.

[The *Lord Chancellor*: If nothing is said as to the term for the stables, must it be understood to be the same as the term for the house?]

If not, and the declaration is defective in that respect, the Court will amend it. Where an executory contract is entered into for making a certain article without any agreement as to the price, the memorandum of the contract will not be insufficient on that account, *Hoadly v. M^cLaine* (*i*).

The objection that this memorandum is not sufficient under the statute of frauds, cannot now be taken. This is an appeal against a decision on the discharge of a rule for a nonsuit, under the Common Law Procedure Act of

(*g*) 5 Esp. 190.
 (*h*) 3 Ves. 34.

(*i*) 10 Bing. 482.

1854; it is not a writ of error on a judgment on the whole case; this new point cannot be raised on such an appeal.

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[Lord *Chelmsford*. It is not quite a new point, but only a fresh argument. The Court of Appeal is entitled to hear that] (*j*).

Mr. *Bovill* and Mr. *Garth*, for the Respondent.

The statement of a contract, to make it sufficient under the statute of frauds, ought to be clear, definite, and precise, so as to avoid any necessity for parol evidence to show what are the terms of the contract. Assuming for a moment (though that fact is denied) that the Respondent had seen the letter of the 31st *August*, and that his letter of the 15th *September* was an adoption of it, still there is no sufficient contract within the statute, for there is no statement of the time or the terms for the proposed tenancy of the stables.

These matters were necessary to create a contract which could be enforced in equity, *Clinan v. Cooke* (*k*). There could not, therefore, be any ratification of a contract as to the stables, for no contract as to them was stated, or existed. There was not anything here to satisfy the statute; for though two papers may be connected together to constitute one contract, still that can only be done where, taken together, they do form a complete contract. If either is defective there is no contract, *Brodie v. St. Paul* (*l*).

The letters of the Respondent, properly considered, do not bear the construction put on them by the other side; they do not ratify the Appellant's letter of the

(*j*) See *Withy v. Mangles*, 10 Clark & F. 215.

(*k*) 1 Sch. & Lef. 22.
(*l*) 1 Ves. J. 326.

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31st *August*, which, indeed, the Respondent had never seen.

No amendment of the declaration can now be made, for that would be to introduce a new contract on the record.

Sir *H. Cairns*, in reply :

Brodie v. St. Paul is not in point here, for in that case there was contradictory evidence with respect to the nature of the covenants; and Lord *Redesdale*, in *Clinan v. Cooke*, showed his disinclination to follow that case. It was found by the jury here, that in fact the Respondent had ratified the agreement as set forth in the letter of the 31st *August*. That letter sufficiently describes the terms of the holding; they are those under which the Appellant held, and he held under a lease which was to be assigned. This is not, therefore, like *Clinan v. Cooke*, a case of creating a new tenancy, without specifying what is to be its duration.

The *Lord Chancellor* proposed the following question for the consideration of the Judges :

“ Upon the evidence adduced at the trial, and the facts found by the jury as stated in the appeal to the Exchequer Chamber, is the Plaintiff entitled to judgment ? ”

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Mr. Justice *Hill* :

My Lords, in answer to the questions submitted to the Judges, I beg to state, that in my opinion the Plaintiff is not entitled to recover.

The question raised upon the rule to set aside the verdict and enter a nonsuit was, whether there was a sufficient contract in writing, signed by the Defendant, to satisfy the statute of frauds.

It was insisted, on the part of the Plaintiff, that the Defendant had by writing signed by him adopted and bound himself to perform the terms contained in the Plaintiff's letter of 31st August 1855; and that such letter, by reason of that adoption and signature, was a sufficient contract in writing to satisfy the statute.

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I am of opinion that it was not sufficient to satisfy the requirements of the statute. It is altogether silent as to the term for which the stables in *Gore Lane* were to be let by the Plaintiff to the Defendant, and the expressions which it uses are quite as consistent with its being the intention of the parties, that the underletting should be for as long a time as the Plaintiff was interested in the stables, as for the term for which he held *Hamilton House*.

It is clear that an agreement for a lease not specifying a definite term cannot be enforced, nor can it be connected by parol evidence with an advertisement in which the duration of the term is expressed, *Clinan v. Cooke* (m). Neither is it sufficient that there exists a probability that the Plaintiff intended to let the stables in *Gore Lane* for the term commensurate with the remainder of the lease of *Hamilton House*. Such probability would not be enough to satisfy the statute of frauds. On this short ground I am of opinion that the Plaintiff is not entitled to recover.

I also think it right to add, that upon a careful consideration of the whole of the evidence of the Plaintiff and of the correspondence, I am unable to discover any agreement binding the Defendant to take the stables for a definite term.

(m) 1 Sch. & Lefr. 22.

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BYLES.Mr. Justice *Byles* :

My Lords, I am of opinion that your Lordships' question must be answered in the negative.

I find no document relating to the stables signed by *Rearden*, the agent. And as the alleged contract is a contract which must be in writing, signed either by the Defendant's agent or by the Defendant himself, it appears to me that the question of ratification does not arise, but that the true question is this, has the Defendant personally entered into any such written and signed contract?

Supposing that the receipt of the 31st *August* is to be considered part of the contract, it refers only to the Plaintiff's letter of the 30th *August*, not to the Plaintiff's letter of the 31st *August*, and I see no reason for agreeing with the Plaintiff's counsel that that date in the receipt is a mistake. But I think it does appear, from the contents of the Defendant's letter of the 15th *September*, that the date of the 31st *August* mentioned in that letter is a mistake.

The letters which must be relied on to bind the Defendant are his letters of the 15th and 18th *September*.

Without wearying your Lordships with minute observations, I think that the letter of the 15th *September* amounts to no contract to take the stables; for that, when carefully examined and compared with evidence legitimate for this purpose, it will be seen that it really refers to no written document in which the stables are mentioned.

The same observation applies, I think, to the Defendant's letter of the 18th *September*.

So far as that last letter may refer in general terms to any parol contract between the Plaintiff and the Defendant's agent, it can have no effect. For a written rati-

fication by the principal of a parol contract made by his agent, cannot satisfy the statute of frauds, unless the ratifying document either itself expresses the terms of the contract or refers to some writing that does.

I farther think that even if the Plaintiff's letter of the 31st *August* could be made part of a written contract, by which the Defendant was bound, still the interest which the Defendant was to take in the stables does not appear. Whether the Defendant was to be assignee of the Plaintiff's term in the stables, or whether he was to be sub-lessee, and if sub-lessee, whether from year to year or for what term, and whether that tenancy or term was to be determinable by the Defendant on his quitting *Hamilton Lodge*, are all stipulations material to be settled before there could be a contract in respect of the stables.

I agree, therefore, with the Court of Exchequer, that either there never was any complete contract with respect to the stables, or, that if there was, the writing does not contain it.

Mr. Baron *Bramwell*:

My Lords, I am of opinion that your Lordships' question should be answered in favour of the Defendant.

I have great difficulty in seeing that any agreement was come to as to the stables. I cannot find whether it was an agreement for an assignment of the lease of the stables, or for a sub-lease for a term equal to the remainder of the term in *Hamilton Lodge*, or whether it was that the Defendant should hold them so long as as he held *Hamilton Lodge*; that is to say, that if the lease of that was determined in any way, or he gave up the personal occupation of it, he should be at liberty to give up the stables. I can find no final agreement on this; and as the agreement for the house and stables is entire, an

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unascertained term of that agreement seems fatal to its validity. But assuming that there was a definite agreement as to the stables, I think it must have been one of the three I have mentioned. But then there is no memorandum in writing of that agreement. For assuming the receipt of 31st *August* to be so incorporated with the Defendant's letters, and to be so adopted by him as, together with those letters, to constitute a memorandum in writing signed by him within the statute of frauds, it is not a memorandum of such an agreement as any of those I have mentioned. The *agreement* must be in writing, or some memorandum of it. Here the writing does not represent the agreement. It does not show either an agreement for an assignment of the lease of the stables, or any sub-lease thereof for a term certain or contingent, equal to the Defendant's intended holding of *Hamilton Lodge*. Suppose a meaning can be put on it (which I doubt), I cannot think it could be held to mean either of the three possible cases I have mentioned. So that, though it might be a good memorandum in writing if it represented the *de facto* agreement, yet as it does not do so, it is not sufficient, *Acebal v. Levy* (n).

Farther, though with considerable doubt, I think there is no memorandum in writing signed by the Defendant within the meaning of the statute of frauds. The question is, whether his letters and the Plaintiff's letters, and the receipt of *August* 31st, with no extrinsic evidence except to identify them, so refer to each other that on collocation they make an agreement by the Defendant, or a memorandum of one. I think not. It seems to me that the Defendant, in his letters, always means that he has seen a paper: what its date and contents are he

(n) 10 Bing. 376.

knows not; but it will speak for itself, and is in *Rearden's* hands, and by it he will be bound. I think he never meant to say, that he would take the stables, unless it was mentioned in the paper he saw that he was to do so.

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Farther, there is great difficulty in saying that without extrinsic evidence, exceeding mere identification, it can be shown that the Plaintiff's letter of 31st *August*, and not that of 30th *August*, contained the terms between the parties, and was the document on which the 50 *l.* were paid. For these various reasons, I think your Lordships' question should be answered in the negative.

Mr. Justice *Crompton*:

My Lords, it seems to me that this case should be considered in two points of view; first, as it was presented to the Court of Queen's Bench; and, secondly, as it was dealt with in the Court of Exchequer Chamber.

Mr Justice
CROMPTON.

When the case was before the Court of Queen's Bench I doubted whether it sufficiently appeared that the letters signed by the Defendant, and supposed by reference to mention and adopt a prior document, really referred to the document of the 31st *August*; or whether they did not refer to the letter handed to the Defendant by *Rearden*, and stated to have been written on the 30th *August*; or whether it is not so uncertain to which they refer as to render it impossible for the Plaintiff to make out that it referred to, and incorporated, the one necessary to support the action.

In the first of Sir *John Bayley's* two letters, on which the case depends, that of the 15th *September*, it is clear to my mind that the Defendant was referring to the letter of the 30th *August*, which contained no reference to the stables. In this letter of the 15th the Defendant, after mentioning his doubts as to the letter he had seen, and as to which it

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turned out that his impression was correct, says:—
 “Whether I read the letter, or Mr. *Rearden* read it to me, I cannot remember ; though I rather think I read it myself, because,” &c. “However, whichever it was, I returned it to Mr. *Rearden*, and told him to keep it, and I suppose he has it, and what *it* is *it* will speak for itself, and I am fully prepared to carry *it* out.” That clearly was the letter shown to the Defendant by *Rearden*, now clearly established not to be the letter of the 31st *August*, to which *Rearden* was proved to have verbally assented.

In answer to this the Plaintiff writes the letter of the 17th *September*, in which it is stated that there were two documents ; and the answer of the Defendant on the 18th *September* is the letter chiefly relied on by the Plaintiff.

In this letter Sir *John Bayley* again repeats his doubts, and states his impression ; and the words which appear to me most to favour the Plaintiff’s view are these words:—
 “The agreement, whatever it is, or whatever its date, Mr. *Rearden* has ; and, as I observed in my former letter, it will speak for itself, and whatever *it* is I shall carry *it* out.”

In relying on this, as it seems to me, the most material sentence in the letter, the Judges in the Queen’s Bench, in their judgment, have not adverted to the reference to the former letter, but give the passage without the words, “as I observed in my former letter ;” which certainly give a very different meaning to the expression, which, when correctly examined, appears to refer distinctly to the document mentioned in the former letter of the 15th *September*, which was clearly not the letter relied on by the Plaintiff.

I am disposed to think, on this part of the case, that it is at least so doubtful to which letter Sir *John* meant to refer as the one to be binding upon him, as to prevent such

reference incorporating the letter of the 31st *August* into that signed by him on the 18th *September*.

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But it may be doubtful whether there was a sufficient signature within the statute of frauds of an agreement assented to by both parties, even adopting the most favourable construction for the Plaintiff of the Defendant's letter. The Plaintiff's construction is, that the Defendant writes in his letter of the 18th *September* that he will agree to that one of the two documents which was agreed to by *Rearden*; that is, in effect, I will agree to the document of the 31st *August* if *Rearden* really agreed to take the house by that document. Is it clear that the signing such a document comes within the rule according to which one document may be incorporated with another so as to constitute a signing within the statute of frauds? That rule is, that by referring in a document signed by the party to another document, the person so signing in effect signs a document containing the terms of the one referred to, according to the maxim, *Verba relata inesse videntur*. But does this rule apply to the case where a party says only, "I do not know which is the document, but I will agree to the one as to which a particular circumstance has happened?"

Can it be said that such a letter, when signed, adopts and contains by reference the terms of either of the letters referred to? Is it not left to the danger of parol evidence? It might, perhaps, be a new conditional promise to agree to that letter which should turn out to be the real agreement, but such new conditional promise was not the promise on which the Plaintiff sought to recover, nor, indeed, was any such new agreement ever assented to by the Plaintiff. It seems somewhat difficult to say that the Defendant assented, by his signature, at the time of such signature, unconditionally and *simpliciter*, to

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the terms of any particular document, so as to incorporate it with the one he signed. If it were a mere matter of identity as to a particular paper, it would of course lie within the rule; but it may be doubtful whether it is within the rule to promise in writing to agree to that one of two documents in dispute as to which a particular circumstance shall turn out to have happened.

As to the question upon which the Court of Exchequer Chamber decided, I concur in that judgment. By the letter of the 31st *August*, the remainder of the lease of *Hamilton Lodge* is to be taken by the Defendant, which imports that it is to be assigned; but when we come to the engagement for the stables, it is quite uncertain to my mind what the agreement means. It is, "to let the stables for the same rent, and subject to the same conditions, that I hold them myself." This seems to me to contemplate rather a letting, as contradistinguished from an assignment; but when I come to ask myself for what term, I am utterly unable to find out. I quite agree that we are entitled, in endeavouring to put a construction on these words, to look at the state of the properties and the terms on which they were held; and we find that *Hamilton Lodge* was held by the Plaintiff for a term of about five years, whilst the lease for the stables had about seven to run. Can we say, as suggested, that the word "conditions" implies "for the same term," so as to make the letting one for the seven years? I cannot think that it is at all expressed that this is the meaning. It would be an assignment in effect, and not properly a letting. Again, is it to be a letting for a time commensurate to the term in *Hamilton Lodge*? I doubt very much whether that was intended. It seems quite consistent with the terms of the document that the taker might want the stables only whilst he, having many horses and carriages, personally

occupied the lodge; and he might be very unwilling to hamper himself with the stables if he ceased himself to occupy the lodge, and underlet or assigned it. It seems quite as likely that the letting should be from year to year; but that might not suit the taker, as he might then have been liable to be turned out whilst he wanted the stables. The letting most likely to suit the taker might be one by which he might have been entitled to hold the stables as long as he continued to hold the lodge, but with a right to determine the tenancy by the usual notice on his part; but probably the landlord might have objected to this.

I do not think that from the expressions used, aided by the fact of the same instrument relating to the other property, and from our knowledge of the duration of the leases, we can collect any sufficiently expressed or definite terms of agreement for letting for any certain period. The case is not like the case where the price is omitted in a contract for the purchase of goods. There, no price is necessary to make a good legal contract, as the law infers a reasonable price; but there can be no reasonable time to be implied for the duration of the letting in the present case.

In all probability the parties had never considered or finally determined what the letting should be, but had inserted the words in question, thinking it better that *Sir John* should have the stables on some terms; but the agreement does not, in my opinion, show what these were to be.

It is no answer to say that this one clause being uncertain, does not affect the rest. It is part of one entire agreement, the agreeing to the whole of which, on the one side, is the consideration for the other side agreeing to

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the whole; and if the statute is not complied with as to any part, the agreement altogether is not within it.

I agree, therefore, with the Court of Exchequer Chamber, in thinking that the Defendant did not sign any memorandum in writing which sufficiently expressed the terms of the agreement within the statute of frauds; and I answer your Lordships' question, therefore, in the negative.

Mr. Justice *Wightman*:

Mr. Justice
 WIGHTMAN.

My Lords, the question in this case is, whether there was any contract in writing between the parties binding upon the Defendant as being made according to the provisions of the statute of frauds; it being agreed that if there is a binding contract, any objection on the ground of variance may be cured by amendment.

Whatever contract there was between the parties, it is to be collected from the letters that have been given in evidence upon the trial; and it appears to me that the same difficulties that are suggested in the present case would have arisen upon the evidence, independently of any question upon the statute of frauds. Can any definite contract between the parties be collected from the written evidence in the case? For if it can, the Plaintiff ought to succeed. It has been settled by a long course of authorities, that if there be an agreement in writing between the parties it is not necessary that it should be in one paper; it may be collected from many, provided they are connected by internal evidence.

On the 14th of *September* the Plaintiff writes to the defendant a letter, which is the first communication that takes place directly between them. In that letter he ex-

presses his regret that his letter of the 31st of *August* to Mr. *Rearden*, accepting his proposition, had never been forwarded to the Defendant, and encloses a copy of the letter. The Plaintiff goes on to say, in his letter of the 14th of *September*, that the stables were inserted at Mr. *Rearden's* express desire, and that the Defendant's solicitors had that morning, written a letter wishing for an assignment of the leases; but that though there was nothing to prevent an assignment of the lease of the house, the Defendant could not give an assignment of his lease of the stables, as it was proposed to take them for five years only, and the Plaintiff's lease was for seven. He adds, that he is preparing to leave the house, and that the premises would be given up to the Defendant on the 29th of *September*.

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To this letter of the Plaintiff of the 14th *September*, the Defendant returned an answer of the 15th, in which he says that Mr. *Rearden* did, on the 31st of *August*, show him a letter of that date, but that it was in some respects unlike the letter of which a copy was sent; and that he, the Defendant, did not recollect that it contained anything about the stables in *Gore Lane*; and that until he received the Plaintiff's letter (of the 14th *September*), he had no idea that there were other stables than those adjoining the garden of the house. He then says, that he cannot remember whether he read the letter, or Mr. *Rearden* read it to him, but that whatever it was it would speak for itself, and he was fully prepared to carry it out.

On the 17th of *September* the Plaintiff writes again to the Defendant, and says that the Defendant ought to have received the last agreement (that of the 30th of *August*), on the *Friday* morning before he left town, as he (the Plaintiff) received the cheque after he had read the agree-

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ment to Mr. *Rearden* and placed it in his hands, that it was so drawn out because Mr. *Rearden* told the Plaintiff that the Defendant would require the stables, and he, the Plaintiff, was satisfied that the Defendant would not have been there a week before he would find that he could not do without them, and that so he (the Plaintiff) would say no more on the subject. He then says that the completion of the business depends greatly upon the Defendant's solicitors, who have had the leases (meaning, no doubt, the leases of the house and of the stables in *Gore Lane*) sent to them.

On the 18th *September* the Defendant writes to the Plaintiff, stating again his doubts whether the letter which *Rearden* had shown him, was that of which the Plaintiff sent him a copy, and whether it was dated the 30th or 31st of *August*; and he adds, "the agreement, however, whatever it is or whatever its date, Mr. *Rearden* has, and it will speak for itself, and whatever it is I shall carry it out." Farther on he says, "If the stables in *Gore Lane* are within the agreement under which I am to take *Hamilton Lodge*, I must of course take them, whether I like them or not." And at the end of the letter he says that he was not aware that the *Gore Lane* stables were included in his agreement, but that Mr. *Rearden* had it, and that if they were included in it, his lawyer was to proceed to carry it out as regards the stables, and at all events as to *Hamilton Lodge*.

Now what is the contract, if any, to be collected from this written evidence? That it was proposed that the Defendant should take *Hamilton Lodge* for the remainder of the Plaintiff's term of five years from the 29th of *September*, and that he should take the stables in *Gore Lane* for five years; that in the letter of the 31st of *August* the Plaintiff agreed to the Defendant having the remainder

of the lease of *Hamilton Lodge* for five years from the 29th of *September*; and also to let to the Defendant the stables in *Gore Lane* for the same rent and subject to the same condition that he held them himself; and that the Defendant agreed that if the stables, &c., were included in the letter of the 31st of *August*, of which the Plaintiff had sent him a copy, and which Mr. *Rearden* had, the agreement in that letter should be carried out. Now there is no doubt but that the stables in *Gore Lane* were included in that letter, but the commencement of the term in the stables is not specified in the letter, nor its end, nor whether it was to be from year to year, or was an assignment of the remainder of the term of seven years; but, taking the whole of what is stated in writing, it seems to me that the Defendant agreed that if the stables were included in the agreement, namely, the letter of the 31st of *August*, it should be carried into effect as to them. And as it appears in writing that the proposition for the stables was that they should be taken for five years, I think that, taking the whole together, the Defendant, by his letter of the 18th of *September*, adopted and confirmed the agreement contained in the letter of the 31st of *August*, explained as to the interest the Defendant was to have in the stables by the statement in the Plaintiff's letter of the 14th of *September*, in which the Plaintiff states that the proposal was to take them for five years (which the Defendant did not object to); and the Plaintiff in that letter farther says, that the premises (which would include the stables) would be given up to the Defendant on the 29th of *September*. It would therefore seem, from the written evidence, that the Defendant did in effect agree to take the stables in *Gore Lane* for a term commensurate with his interest in the house, and commencing at the same time, namely, the 29th of *September*.

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It is said, in the judgment of the Court of Exchequer Chamber, with respect to the stables, "that if anything at all definite had been agreed on, it seems to have been an underlease for five years, but without any stipulation as to the period from which the five years were to begin." As there is no doubt but that the Court will look to the circumstances known to both parties at the time, I am disposed to think that it appears upon the written evidence, that the stables were to be let by the Plaintiff to the Defendant for five years, commencing on the 29th of *September*, so as to be co-extensive with the term in the House; and that the Defendant did, by his letter of the 18th of *September*, agree to that effect.

I do not attach any importance to the stables not being mentioned in the receipt, as that document only related to that which the deposit was paid for, and which had no connection with the stables.

Upon the whole, I am of opinion, though I must confess with some doubt, that the Plaintiff is entitled to succeed, even though the pleadings would require amendment, and I therefore answer your Lordships' question in the affirmative.

Lord Chief Baron *Pollock* :

Lord Chief
 Baron
 POLLOCK.

My Lords, several questions arise in this case; first whether there was any contract between Mr. *Rearde* and Major *Fitzmaurice*, verbal or written; secondly whether Sir *John Bayley* ratified any contract, and if what? Thirdly, whether the contract, taking it to have been ratified, and to be founded on the letter of the 1st of August, is sufficiently clear and explicit to be the foundation of an action?

I am not at all satisfied that there was any contract between Major *Fitzmaurice* and Mr. *Rearden* capa

being ratified. It may be said that the verdict of the jury has put that matter beyond doubt. But the receipt is silent about the *Gore Lane* stables, and professes to be founded on the letter of the 30th *August*. Major *Fitzmaurice*, however (in his letter of the 14th *September*), states, that he received the 50*l.* in earnest of “the whole thing” being carried out; leaving it on the written memorandums, which the verdict of the jury cannot alter, quite uncertain whether there was not some misunderstanding and no agreement; but however this point may be, it appears to me very clearly, that Sir *John Bayley*’s letter of 15th *September* confirmed and ratified the agreement, provided it was founded on the letter of 30th *August*, which he had seen. There cannot be a doubt as to the letter he referred to; it is sufficiently identified by the word “ornaments.” He says, “I returned it to Mr. *Rearden*, and told him to keep it, and I suppose he has it; and “whatever it is it will speak for itself, and I am fully prepared to carry it out.” All this clearly refers to the letter of 30th *August*, and to that only. Major *Fitzmaurice*’s answer calls Sir *John Bayley*’s attention to the two letters, one of 30th *August*, the other of 31st *August*; to which Sir *John Bayley* replies:—“As I observed in my former letter, it will speak for itself, and whatever it is I shall carry it out;” which I understand to be merely a reiteration and confirmation of the former letter. He says, “I do not know what I saw, it may have been the letter of 30th or 31st, or some other, but whatever it is I shall carry it out;” the “it” always “being the letter he saw,” which was no doubt the letter of the 30th *August*, and not whatever letter a jury might find was shown to Mr. *Rearden*, for he expressly declines to interfere as to differences between them. But the agreement or proposition contained in the letter of 31st *August* itself appears to me

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to be too uncertain to be the ground of an action, and it is an uncertainty that cannot, in my judgment, be cured by any amendment.

On the whole, therefore, I think it doubtful whether there was any clear, distinct agreement even between Mr. *Rearden* and Major *Fitzmaurice*. I am satisfied that Sir *John Bayley* did not ratify any agreement except that which he had seen, and therefore not the letter of 31st *August*; and even if it is to be taken that he ratified that, it is, I think, too uncertain and vague to be regarded as a compliance with the statute, and I think the Plaintiff is not entitled to judgment.

The Lord Chancellor (Lord *Campbell*):

Aug. 3. My Lords, for the reasons assigned by my brother *Wightman*, in answer to the question submitted by your Lordships to the Judges in this case, I adhere to the judgment of the Court of Queen's Bench as delivered by my brother *Erle*, now Lord Chief Justice of the Common Pleas.

It would appear that this judgment would have been affirmed in the Court of Exchequer Chamber had not a new point been there raised, which was not mentioned in the Court of Queen's Bench, viz., that although the terms of the agreement stated in the Plaintiff's letter respecting *Hamilton Lodge* and the stables in *Gore Lane* had been ratified by the Defendant's letter, yet, in as far as the stables were concerned, there was not a sufficient memorandum of the agreement to satisfy the statute of frauds, as the Plaintiff in his letter merely said, "I agree to let to Sir *John Bailey* the stables in *Gore Lane* for the same rent and subject to the same conditions that I hold them myself," without stating the duration of the term for which the stables were let. Regard being had to the

whole of the letter and to the facts which were known to both parties, I think that the meaning of this proposal was sufficiently certain, and that the Defendant was not at liberty to make this objection after his letter in which (as the jury found), in reference to this very letter he had written, "the agreement, whatever it is, or whatever its date, Mr. *Rearden* has, and it will speak for itself, and whatever it is I shall carry it out. If the stables in *Gore Lane* are within the agreement under which I am to take *Hamilton Lodge*, I must of course take them, whether I like them or not."

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However, as I understand that my noble and learned friends who heard this Appeal argued at your Lordships bar are of a contrary opinion, the judgment appealed against must be affirmed.

Lord *Cranworth* :

My Lords, I certainly have come in this case to the conclusion that Major *Fitzmaurice*, the Plaintiff below, has not established his case upon the facts stated in the special case, and that consequently he is not entitled to judgment. And I have come to that conclusion upon the ground that the requisitions of the statute of frauds were certainly not complied with. It is found as a fact (and that of course we cannot controvert) that the letter of the 31st of *August* was read over to *Rearden*, the agent. But then neither Sir *John Bailey* nor *Rearden* ever signed any agreement coming within the statute of frauds accepting the terms of that letter. I state that, because I come to that conclusion without any hesitation as a matter of fact upon reading those letters. The Defendant *Bayley's* letter of the 15th *September*, in which he binds himself to take a lease, referred to the prior letter of 30th *August*, not to the letter of 31st *August*,

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although in his statement he mistook the date, or rather adopted the date from the statement of Major *Fitzmaurice*. Now, the letter of 30th *August* did not refer at all to the stables. I am of opinion, therefore, that Sir *John Bayley* never signed any letter accepting any lease which contained the stables as part of that lease. If that was doubtful upon the facts in evidence (and undoubtedly I cannot say it is not doubtful, after the opinion which has been expressed upon that point, not only by the learned Judges below, but also by my noble and learned friend on the woolsack); still I think that the Plaintiff would not be entitled to the judgment of the Court, because I think that, even if he had accepted in writing the terms in the letter of 31st *August*, it would not have amounted to a binding contract for taking the stables for any defined term of years. It might be that he was to take them for a term of years concurrently with the time for which he held *Hamilton Lodge*; it might be that he was to take them for the whole term for which Major *Fitzmaurice* held them, which was longer by a year or two than the term for which *Hamilton Lodge* was held. It is essential, in order to bring the case within the provisions of the statute of frauds, that there should be an agreement specifying the extent of the term for which the lease is to continue. Even therefore supposing that the letter of the 15th *September* did refer to the letter of the 31st *August*, which included the stables as well as the house, still I think that the Plaintiff would not be entitled to judgment, because there was no written agreement showing for what term those stables were to be taken.

On these short grounds, I am of opinion that the judgment ought to be for the Defendant.

Lord Chelmsford:

My Lords, it being admitted that Mr. *Rearden* had no previous authority from Sir *John Bayley* to take the stables in *Gore Lane*, two questions arise in this case—

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1st. Whether any agreement was, in fact, entered into between *Rearden* and Major *Fitzmaurice* relating to the stables?

2d. If there was such an agreement, whether it was ratified by Sir *John Bayley*?

With respect to the first question, the Court of Exchequer Chamber came to the conclusion that there never was any complete agreement as to the duration of tenancy for which the Defendant was to take the stables, or that if there was, the writing did not contain it. And certainly there is nothing to prove the allegation in the declaration, that the Defendant agreed to accept an underlease of the stables for the term of five years wanting fifteen days. Nor do the words in the letter of the 31st *August* 1855, "for the same rent and subject to the same conditions as I hold them myself," bind Sir *John Bayley* to take an assignment of the lease of the stables; nor were they intended so to do. For in Major *Fitzmaurice's* letter of the 14th *September*, he writes, "but as it was proposed taking the stables for five years only, I cannot give you an assignment of my lease for seven." But if *Rearden* had received from Sir *John Bayley* a previous authority as ample as the ratification was supposed by the Court of Queen's Bench to have been, I should have been disposed to think that by his adoption of the terms of the letter of the 31st *August*, *Rearden* might have bound Sir *John Bayley* to take the stables from year to year.

It therefore becomes necessary to consider in the next place, what is the nature of the supposed ratification by Sir *John Bayley*, of any agreement entered into by *Rear-*

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den. Now ratification may take place in two ways, either by a specific ratification of the particular act, or by a general ratification of everything which has been done by the agent on behalf of his principal. There does not appear to me to have been any express ratification of the terms of the agreement contained in the letter of the 31st *August*. There is indeed very great doubt whether Sir *John Bayley* ever knew of that letter until he received a copy of it enclosed in Major *Fitzmaurice's* letter of the 14th *September*. From Sir *John Bayley's* letters of the 15th and 18th *September*, it would seem as if he had originally seen only Major *Fitzmaurice's* letter of the 30th *August*. The receipt which was prepared by *Rearden*, and in which the reference was made to that letter (probably by mistake, as there was a provision for valuing the furniture and fixtures also in the letter of the 31st *August*), was not sent to Sir *John Bayley* until the 17th *September*, as appears by his letter of the following day. And therefore nothing turns on the date of the 30th *August* in that receipt. [His Lordship here went fully through the letters and observed,] I am satisfied that Sir *John Bayley* was in error when he stated that the letter shown to him by *Rearden* was of the date of the 31st *August*, and that the only letter which he saw must have been the one of the 30th *August*, because there is the word "ornaments" in this letter which is nowhere to be found in the letter of 31st *August*; and this last letter is the only one which mentions the *Gore Lane* stables. In the face of these statements, confirmed as they are by the circumstances to which I have adverted, it is impossible to say that Sir *John Bayley* ever, in fact, agreed to the terms contained in the letter of the 31st *August*.

The Court of Queen's Bench, however, was of opinion that a ratification of the contract made by *Rearden* wa^s

established by the general expressions used by Sir *John Bayley* in his letters. One passage upon which the Court relied for this conclusion is from Sir *John Bayley's* letter of the 18th *September*. "With respect to the authority, &c." [*see the letter, ante.*] But in citing this passage, the Court has omitted the important word *else*, and also a portion of the sentence, by which a different meaning is given to the whole. [His Lordship read the whole of the passage.]

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The strongest part of this letter, undoubtedly, and which is also relied upon by the Court, is the following: "The agreement, however, whatever it is, or whatever its date, Mr. *Rearden* has; it will speak for itself, and whatever it is I shall carry it out." On the one hand it is said that the meaning of this passage is, "Whatever you prove to be the agreement I will be bound by it." On the other, "I am ready to be bound by any letter, whatever it was, that was shown to me." I think that the fair interpretation of the language is, "If *Rearden* has done that which binds him, I shall consider myself bound, in fact, although I gave him no authority." This brings us back to the question whether *Rearden* had entered into any agreement for the *Gore Lane* stables. I think it is extremely doubtful whether there was any complete agreement between *Rearden* and Major *Fitzmaurice* upon this subject. At all events the utmost extent to which the letter of the 31st *August* can be carried, is to the creation of a tenancy from year to year. But such a tenancy was clearly not in the contemplation of Sir *John Bayley*. And therefore, even if it should be considered that his expressions (vague and uncertain as they are) amount to a ratification of whatever was binding upon *Rearden*, this conclusion would not support the declaration; and no amendment ought to be allowed to force

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upon him an agreement entirely different from that into which (if at all) he must have meant to enter.

For these reasons I think the judgment of the Exchequer Chamber ought to be affirmed.

Judgment of Exchequer Chamber affirmed, and Appeal dismissed.

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 —
 "Demise."
 "Agree."
 "Grant."
 Marriage
 Settlement.
 Annuity.
 "Covenant,"
 Express and
 Implied.
 Costs.

JAMES ISAAC MONYPENNY - - *Appellant.*

SUSANNAH MONYPENNY - - *Respondent.*

The grantee, by deed of settlement on marriage, of an annuity charged upon certain lands, in which deed the grantor (there being no fraud) declares himself entitled in fee simple to the lands charged, may treat such declaration as a covenant; and, on it afterwards appearing that the grantor had really only a life estate, may proceed against his estate to obtain payment of the arrears of this annuity.

P. M., the uncle of a person about to marry, became a party to the marriage settlement, which recited that he proposed and agreed to secure to the intended wife, in case she should survive him, an annuity to be payable out of the manors mentioned in the settlement, "of or to which he is seised or entitled in fee simple." The granting part witnessed that he granted this annuity payable out of the lands of, &c., to which he or any person in trust for him "is seised or entitled for an estate of inheritance at law or in equity;" habendum to the intended wife for her life, subject to mortgage, and also subject to any provision he had made or might make in favour of his own wife. The grantor covenanted "for himself, his heirs, and assigns," with the grantee, "her executors, administrators and assigns," that in case of the annuity falling into arrear it should be lawful for "her executors, administrators, and assigns" to distrain. For farther security he created a term in trustees, granting them a like power of distress. After the grantor's death it was discovered that he had only possessed a life estate in the largest part of the premises. The annuity fell into arrear :

HELD (*diss.* Lord *St. Leonards*), that the deed of settlement must be construed as containing a covenant for title ; that the covenant for himself made his executors liable, as there was nothing to qualify it ; and as by the failure of the grantor's estate the right to distrain did not exist, the grantee was entitled to come on the personal estate of the grantor for satisfaction of the annuity.

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After the discovery of the defect in the grantor's title, a small part of the lands charged (of which part the grantor had been seised in fee) was sold, the grantee of the annuity received the purchase money in part discharge of the arrears :

HELD, that this did not destroy her right to proceed on the covenant.

Per Lord *St. Leonards* : She had thereby elected to treat the annuity as a rent-charge, and could not afterwards proceed to recover it as a mere annuity.

The Lords differed in opinion, so no costs were given.

By an indenture dated 10 *June* 1835, made between *Robert Joseph Monypenny* of the first part, *Susannah Dearden*, spinster, of the second part, *Phillips Monypenny* of the third part, and certain trustees therein named of the fourth part, in contemplation of a marriage between *R. J. Monypenny* and *Susannah Dearden*, it was recited that *Phillips Monypenny* had, under a deed dated 31 *January* 1829, a power over an estate situate at *Rolvenden*, in the county of *Kent*, and called *Chillendens Farm*, with remainder to himself in fee ; that upon the treaty for the marriage, *Phillips Monypenny* proposed and agreed to secure, in manner and subject as thereafter was expressed, to the said *Susannah* after the decease of the survivor of them, *Phillips Monypenny* and *R. J. Monypenny* in case she should survive them, an annual sum or yearly rent-charge of 300 *l.* for her jointure, to be issuing and payable out of the manors and other hereditaments thereafter charged therewith, and of or to which he, *Phillips Monypenny*, was seised or entitled in fee simple. And it was witnessed that in pursuance and part performance of the agreement on the part of *Phillips Monypenny*,

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and in consideration of the said intended marriage, *Phillips Monypenny* gave, granted, bargained, sold, and confirmed unto *Susannah* and her assigns, in case the said intended marriage should take effect and she should survive both of them, *Phillips Monypenny* and *R. J. Monypenny*, one annual sum or yearly rent-charge of 300 l. to be charged and chargeable upon and yearly issuing and payable out of all and singular the manors or reputed manors of *Maytham Nether*, *Forsham*, and *Rensham* in the county of *Kent*, and also all that mansion house called *Maytham Hall*, in the same county, and also all and singular the messuages, lands, tenements, and hereditaments in the several parishes of *Rolvenden*, *Tenterden*, *Benenden*, *Sandhurst*, *Newenden*, *St. Mury in Wittersham*, and *Stone* in the *Isle of Orney*, in the said county, of or to which he, *Phillips Monypenny*, or any person or persons in trust for him, was or were seised or entitled for an estate of inheritance at law or in equity, and to be charged and chargeable upon and yearly issuing and payable out of all and singular the rights, members, and appurtenances to the same manors, hereditaments, and premises belonging or in anywise appertaining, to have hold, receive, and take the said annual sum or yearly rent-charge of 300 l. in case," &c., subject to a mortgage term particularly stated, and "also subject and without prejudice, as to all the said manors and other hereditaments, to such annual sum or yearly rent-charge, or annual sums or yearly rent-charges, as *Phillips Monypenny* had already charged, or should or might thereafter charge, by his last will and testament, or any codicil or codicils thereto, or in any other manner, in favour and during the widowhood or life of his then present wife *Charlotte Monypenny*, and to all powers, remedies, and limitations for securing and compelling payment of the same unto the said *Susannah* and her assigns, &c.,

during her life in part for her jointure, to be paid, &c. And *Phillips Monypenny*, for himself, *his heirs and assigns, covenanted, granted, and agreed* with and to the said *Susannah, her executors, administrators, and assigns*, that so often as the rent-charge of 300 *l.* or any part thereof should at any time or times be unpaid for the space of twenty-one days, it should be lawful for the said *Susannah, her executors, administrators, and assigns* (but subject, &c., as thereinbefore mentioned) *to enter into and distrain upon the manors, hereditaments and premises thereby charged with the payment of the said annual sum or yearly rent-charge of 300 l. or any of them, or any part thereof, and to dispose of the distress, &c., there found according to law, as in the case of distress taken for rent reserved, to the intent that thereby the said Susannah, her executors, administrators, and assigns, might be fully paid and satisfied the said annual sum or yearly rent-charge of 300 l. and every part thereof, and all costs, &c.; and also that so often as the said annual sum or yearly rent-charge of 300 l., or any part thereof should at any time be unpaid for the space of forty days, it should be lawful for the said Susannah, her executors, administrators, and assigns, subject as before, to enter into and upon the manors, hereditaments, and premises thereby charged with the said annual sum or yearly rent-charge of 300 l. or any of them, or any part thereof, and to have, hold, and enjoy the same, and receive the rents, issues, and profits thereof to and for her and their own use and benefit, until she or they should therewith or thereby or otherwise be fully paid or satisfied the said annual sum or yearly rent-charge of 300 l. and every part thereof, and all arrears, &c. In pursuance of the said agreement, &c., and for the consideration before mentioned, and for better securing to*

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the said *Susannah*, her executors, administrators, and assigns, the due payment of the said annual sum or yearly rent-charge of 300*l.* before charged, or intended so to be, *Phillips Monypenny* granted, bargained, sold, *demised*, and confirmed unto the trustees, their executors, administrators, and assigns, all and singular the manors, hereditaments, and premises thereby charged, to have and to hold the same subject, &c., as before mentioned, and also subject to and charged with the said 300*l.*, and the powers and remedies before given for securing the payment thereof unto the trustees, their executors, administrators, and assigns, for the term of 100 years, to commence and be computed from the decease of the survivor of *Phillips Monypenny* and *R. J. Monypenny*, and thenceforth, &c., without impeachment of waste, upon the trusts and subject to the proviso thereafter contained concerning the same, in trust," &c. And power was given to the trustees, the survivor, or the executors, administrators, and assigns of such survivor, by demising, levying, mortgaging, &c., to raise the money.

The marriage was solemnised shortly after the date of the indenture.

Phillips Monypenny died in 1841. *R. J. Monypenny* died in the month of *September* 1842.

The right of *Phillips Monypenny* to charge the *Maytham Hall* estate by the indenture of the 10th day of *June* 1835, with the annuity of 300 *l.*, was disputed upon the ground that he was merely tenant for life of that estate. And by a decree, dated 18th *July* 1851, made by Vice-Chancellor Sir *James Lewis Knight Bruce*, which decree was affirmed, upon appeal, by Lord Chancellor *St. Leonards* in *July* 1852, it was declared that *Phillips Monypenny* had only a life interest in the *Maytham Hall* estate,

and that *R. T. G. Monypenny* was entitled to the possession thereof (*a*).

At the date of the indenture of 10th *June* 1835, *Phillips Monypenny* was entitled in fee to a farm and lands, situate at *Rolvenden*, and known by the name of “*Little Job’s Cross* ;” and such farm and lands accordingly became charged with the annuity of 300 *l.*, expressed to be created by the same indenture.

By an order of the Court of Chancery, dated 24 *January* 1854, and made in another cause, it was ordered that the “*Little Job’s Cross Farm*” should be sold, and it was sold by public auction for the sum of 1,342 *l.* 8 *s.* 3 *d.*, which money was afterwards, under an order of the Court, paid over to the Appellant, in accordance with a petition which she had presented to that effect.

An administration suit was instituted by *Phillips Monypenny’s* executors, and Mrs. *Susannah Monypenny* claimed to come in as a specialty creditor of the estate on account of her annuity.

The question was argued before Vice-Chancellor *Wood* and Barons *Bramwell* and *Watson*, and on 13 *February* 1858, Mr. Baron *Bramwell* delivered their joint opinion to the effect that there was not in the indenture of settlement of 10 *June* 1835, any covenant on which *Susannah Monypenny*, or the trustees of the term of 100 years, could, in the events which had happened, maintain an action at law against the executors of *Phillips Monypenny*; the *Vice-Chancellor* adopted this opinion, and made a decree accordingly (*b*). On appeal to Lord Chancellor *Chelmsford*, this decree was, by an order of 31 *January* 1859, reversed, but in the account directed Mrs. *Monypenny* was ordered to give credit for what she had

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(*a*) 2 De G. M. & Gord. 145.

(*b*) 4 Kay & Joh. 174.

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received for "*Little Job's Cross Farm*" (c). This appeal was then brought.

Mr. *Rolt* and Mr. *Baggallay* (Mr. *Honyman*, of the Common Law Bar, was with them) for the Appellant:

Nothing here expressly renders liable the estate of *Phillips Monypenny*. The recital of his title in fee to the lands charged cannot have that effect. There is here no covenant for title, nor any express promise to pay. The covenant here is for the grantor, his heirs, and assigns, a form which shows that it was intended to be restricted to the estate he possessed, and they would represent. In *Right v. Bucknell* (d) it was decided that a release with the words "granted, bargained, sold, assigned, aliened, remised, and released," did not operate as an estoppel, because the release passed nothing but what the releasor had at the time, and therefore did not pass the legal estate, for he had it not at the time. Yet there the releasor covenanted that "he was lawfully or equitably seized in his demesne as of fee, and in and otherwise well entitled to" the premises. The general covenant here implied in the word "demise" is restricted by the express covenant for quiet enjoyment. Besides which no implied covenant can be more extensive than the covenantor's interest, *Adams v. Gibney* (e), where tenant for life, with remainder over, demised to lessee, his executors, &c. for fifteen years, without any express covenant for quiet enjoyment; and on the lessee being evicted after the death of the tenant for life, and before the expiration of the fifteen years, it was held that the lessee could not maintain an action against the executor of the tenant for

(c) 3 De G. & Jo. 572.

(e) 6 Bing. 656.

(d) 2 Barn. & Ad. 278.

life; and it is a settled rule that an express covenant qualifies and restrains a general covenant in law, *Nokes'* case (*f*); a rule expressly adopted in *Line v. Stephenson* (*g*).

Then, as to the Respondent taking the produce of the sale of *Job's Cross Farm*, that was an act of election, by which the Respondent elected to treat her annuity as a rentcharge, and after that she could not proceed by writ of annuity, *Littleton* (*h*), which is confirmed by *Coke* (*i*).

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Mr. *Daniel* and Mr. *Mellish*, of the Common Law Bar
(Mr. *C. Berkeley* with them), for the Respondent:

Here is an express covenant that it shall be lawful to enter and distrain; that necessarily implies a liability to make good what might be otherwise obtained by the distress. The consideration here was perfect; it was marriage; and *Phillips Monypenny* stood *in loco parentis* to the nephew. The title is not left to be judged of by the grantee; it is expressly declared to be in the grantor, who declares that he is seised in law or equity, and assures the annuity to the Respondent for her life. That is by necessity a covenant for title. *Maytham House* was a property known to all parties; it was expressly declared to be subject to a mortgage of *Phillips Monypenny*, which showed that he had a legal estate in it; and he, besides, reserved to himself the power of charging it for his wife's benefit. The statements of title were complete, and the covenants were not inaptly worded to express the obligation into which *Phillips Monypenny* entered; and, while reciting the mortgage which prevented him granting the legal title at that moment, he covenanted that he could grant a right to distrain. Suppose *A.* grants to *B.* for life, with a power to distrain, but there is nothing in

(*f*) 4 Co. Rep. 80.

(*g*) 6 Bing. N. C. 678.

(*h*) S. 219.

(*i*) Co. Litt. 145 a.

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the grant importing personal liability; there are arrears; the grantee dies; the arrears cannot be recovered by distress; under such circumstances, there being no other remedy, the law supplies the remedy for the executors by action against the grantor.

The fact that the annuity did not begin till after the death of the grantor is immaterial. In *Plumer v. Marchant* (*j*), it was declared that where the intestate is bound, the obligation falls on his administrator, though he himself could not be sued. If a man covenant with *B.* and dies, an action lies against his executor or administrator upon it, though he be not named in the covenant, *Comyn's Digest* (*k*).

Mr. *Baggallay* replied.

The Lord Chancellor (Lord *Campbell*) :

In this case the question which we have to determine is, whether the Respondent *Susannah Monypenny* is entitled to be admitted as a creditor upon the personal estate of the Rev. *Phillips Monypenny*, deceased, in respect of the annuity granted to her by the indenture dated 10th *June* 1835; and this depends upon whether she can maintain an action on this deed against the executors of *Phillips Monypenny* to recover the arrears of this annuity.

I agree that her claim is purely legal, as, under the circumstances of this case, failing her right at law, an equitable claim could not be supported. But with very great deference to those from whom I differ, I am bound to say that it appears to me very clearly that the proposed action would lie.

(*j*) 3 Bur. 1384.

(*k*) Covenant, C. 1.

This deed is a settlement on the marriage of *Susannah Dearden* with *Robert Monypenny*, his uncle, *Phillips Monypenny*, being a party to it. The deed contains the following recital and covenants. [His Lordship here read the material parts of the deed of settlement, *see ante.*]

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Robert and *Phillips Monypenny* having died, and it turning out that in by far the greatest part of the hereditaments, charged with the annuity, and over which the right to distrain was given, *Phillips Monypenny* had no interest, legal or equitable, beyond his own life, and the annuity being in arrear from the time when it was to commence, and the power of distress given by the deed being unavailing, the question arose whether the grantee of the annuity had a right of action against the representatives of the grantor? The Appellant contends that she had not, and was entirely without remedy.

I apprehend the general rule to be, that where a rent-charge is granted, an action will not lie against the grantor, while the power to distrain is available; but that if the power to distrain becomes unavailing, from the grantor being proved to have had no estate in the hereditaments on which the annuity is charged, or from his interest in them having expired, the remedy of the grantee is the same as if there had been a simple grant of the annuity, without the grantor professing to give any power to distrain.

Here I think that an action might be brought on the express covenant, that on the annuity being in arrear, it should be lawful for *Susannah* to enter into and distrain upon the hereditaments charged with the annuity, that she might be fully paid and satisfied the said rent-charge, and every part thereof, and all costs, charges, and expenses attending the recovery of the same. At no

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time since the annuity became payable, was it lawful for the grantee so to enter and distrain, and the annuity is in arrear. Why should not the representatives of the covenantor be liable for the breach of this covenant?

We are told that the deed is designedly framed to avoid all personal liability for any defect of title. How is this consistent with the recital that the grantor is "seised or entitled in fee simple," and with the charge being upon the hereditaments of or to which the grantor is seised or entitled for an estate of inheritance at law or in equity. The whole scope of the deed must be regarded, and the grantor must be considered to contract and covenant as owner, in fee simple at law or in equity, of the hereditaments charged with the annuity. Marriage is the consideration for all the covenants, and if any of them seem doubtful, they ought to have a construction in favour of the covenantee. But the language of the deed seems to me quite explicit to show that she was to be absolutely secured during her life in the enjoyment of the annuity, dating from the death of her husband and *Phillips Monypenny*.

I agree with the counsel for the Respondent, that *Phillips Monypenny* may be supposed by the marriage settlements to have said to *Susannah*, "In consideration of your marrying my nephew, and your consenting to the settlement of his estates in the manner described, I will grant you an annuity of 300 *l.* a year, and this I charge on the estates of which I tell you I am seised in fee, and on which you will have a right to distrain if the annuity should ever be in arrear." The law adds: "If this power of distress should become unavailing, you may bring an action against the executors of Mr. *Phillips Monypenny*."

It is said that the covenant is not in the common form

which is used where personal liability is to be incurred, and that the covenant, if covenant it be, is only for *Phillips Monypenny*, "for himself, his heirs, and assigns," without mention of his executors or administrators. There are authorities to show that if he had entered into such a covenant merely for himself, his executors would have been liable upon it. A covenant being merely an agreement under seal, I must own I am at a loss to understand on what ground the two learned Barons, who gave an opinion on the construction of the deed, could come to the conclusion that it did not contain any covenant personally binding on the grantor or his representatives.

To my great astonishment, it has been farther urged, that although there may be a covenant in the deed that it should be lawful to distrain for the arrears of the annuity, it only extends to breaches of the covenant in the lifetime of the covenantor, whereas, in truth and in fact, there could be no breach in the lifetime of the covenantor, for the annuity was not to begin till he was dead.

The omission of a covenant by the grantor to pay the annuity must be immaterial, for the mere grant of the annuity, in the absence of a charge on lands with a power of distress, would amount to a promise to pay the annuity, and would impose a personal liability.

It is hardly necessary to mention the objection that, in the absence of a covenant to pay the annuity, the remedy at law would be an action of covenant for unliquidated damages. The damages would be the exact amount of the sum to be recovered as arrears of the annuity if there had been a covenant to pay on which an action of debt might have been brought, and the right of Mrs. *Monypenny* to come in as a creditor in the administration suit pending in equity, cannot depend upon the form of

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action to be resorted to, according to the technical rules of legal procedure.

The authority chiefly relied upon by the Appellant was *Adams v. Gibney* (1), in which the tenant for life, with remainder over, having, by indenture, demised for fifteen years, without any express covenant for quiet enjoyment, and the lessee being evicted by the remainderman after the death of the tenant for life and before the expiration of the term, it was held that the lessee could not maintain covenant against the executor of the tenant for life. That case may properly be cited to show that, according to the just construction of the indenture before us, it contained no implied covenant for title; but it does not at all apply to the express covenant that it should be lawful for the grantee of the annuity to distrain on the hereditaments charged, and so to obtain full payment and satisfaction for any arrears of the annuity which might be due to her.

Upon the whole, my Lords, I would advise your Lordships to affirm the decree appealed from, and to dismiss the appeal.

Lord *Cranworth* :

My Lords, my noble and learned friend on the woolsack having proposed to your Lordships to affirm the decree which is appealed against, and which was made by my noble and learned friend near me (Lord *Chelmsford*) when he held the great seal, I should not have thought it necessary to add a word more than that I concur with him in the opinion which he has expressed, were it not that I have reason to know that that is an opinion not entertained by all your Lordships who heard the case

(1) 6 Bing. 656.

argued, and that it is at variance with the original decree of a very learned judge, Vice-Chancellor *Wood*, assisted as he was by two common law judges in giving that opinion. This decision, therefore, of my noble and learned friend being at variance with other opinions entitled to the very greatest consideration, I have thought it right to state, as I shall state very shortly, the grounds upon which I arrive at the same conclusion as that which has been expressed by my noble and learned friend on the woolsack.

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In the first place, it is not a matter of controversy that this is purely a legal question. The question is whether, upon the covenant which has been referred to, Mrs. *Monypenny* could or could not sustain an action of covenant, because it was not lawful for her to distrain upon the lands in question.

Now, *primâ facie*, I should have thought that there could be no possible question, indeed, upon the words it is not disputed that there could be no possible question, that such an action would lie. *Phillips Monypenny*, now deceased, covenanted, upon the marriage of his nephew with this lady, "that in case and so often as the said annual sum or yearly rentcharge of 300 *l.* (which he had granted to her, to commence on the death of himself and her intended husband), "or any part thereof should, at any time or times, be behind or unpaid for the space of twenty-one days," then "it shall be lawful for the said *Susannah*, her executors, administrators, and assigns, but subject and without prejudice as aforesaid, to enter into and distrain upon the manors," and so on.

Supposing that in an action a declaration had been framed, stating that covenant, and stating that, nevertheless, it was not lawful for her to distrain, what possible answer could there have been to it? According to

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the old practice, in order to raise the question which has been attempted to be raised here, the course would have been to claim over of the whole deed, because the argument insisted upon is, that although that is *primâ facie* an express covenant, which cannot be controverted, yet, if you look at the whole of the deed, you will see that that was not the meaning of the parties when they entered into that engagement. The course would therefore have been to claim over of the whole deed which had been set out; and then, upon that, I presume the executors of *Phillips Monypenny* would have demurred, and said "There is no covenant." That course of practice, though altered now in point of form, is not altered at all in point of principle. The only difference, where there is no over of the deed set out, is, that the Defendant sets out as much of the deed as he alleges will raise that which would be the *primâ facie* construction to the covenant. If the covenant was set out, then I presume they would be entitled to demur upon having that set out. The question which arises is this, whether upon the whole deed there is anything to cut down that which no one, I think, can controvert on the face of it to be an express covenant. Now, the reason upon which the learned judges considered the *primâ facie* import of the covenant to be cut down, I understand to be this: the lands upon which the rentcharge is charged, or expressed to be charged, are stated in the deed to be lands of which *Phillips Monypenny* is seised or entitled in fee simple at law or in equity. The learned judges say you cannot legally have a rentcharge out of lands to which he was only entitled in equity; it is impossible; and therefore the covenant could not be meant to extend to that case. I confess that I cannot follow that reasoning. What is there to prevent me, if I like to do so, from covenanting

that it shall be lawful for parties to distrain upon the land of a stranger. I may have made some arrangement with him, whereby it shall be arranged that it shall be lawful to do so with regard to lands of which he is seised in equitable fee-simple. Nothing can be more reasonable than that I should covenant that it shall be open to you to distrain, because I shall instruct, or my executors may instruct, those who have the legal estate to allow you to distrain. I can see nothing at all impossible, or in the slightest degree unnatural in that. I think the argument of the learned judges would go to show, that in hardly any case in which such a covenant as this exists could the covenant be valid, because almost always, or at least in a great proportion of cases, parties making settlements are not actually seised of the fee simple, but have equitable as well as legal titles in the lands settled. I cannot say, therefore, that I can follow that reasoning of the learned judges.

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But then in the argument here it was farther said that, upon looking at the whole deed, you would see that there was no intention to create a personal obligation upon the grantor of this rentcharge, because if you look at the covenant for title, you will see that there is nothing in the rest of the deed that imports an absolute covenant on the part of the grantor of this rentcharge, that he was seised in fee. All I can say is, that he has recited, that, upon the marriage, he has agreed to grant the rentcharge, "to be secured in manner hereinafter mentioned." In all human probability he did not know anything about what the effect of the covenant was. He thought he was seised in fee, and it turns out he was not seised in fee. Therefore one of the securities which he thought he was giving has failed; but the other, in my opinion, has not failed. But why, because one has failed, it should be

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supposed that the other necessarily fails, passes my comprehension. He recites that he is seised in fee; it turns out that he was mistaken in that; and therefore it is supposed that, looking at that circumstance, you may imagine that he, in the covenant, did not truly express that which, from the rest of the deed, in the absence of the covenant, you must infer him to have expressed.

But be it remembered, we cannot speculate upon what covenant we think he would have introduced if he had known his real title. The only question for us is, what covenant has he introduced? I cannot see how his want of title to the fee can at all, by any possibility, affect the construction of the deed. Let me put this case: suppose the defect of his title had arisen from the fact, not that there was a title paramount of which he was unaware, but that he had, fraudulently if you please, concealed from the parties that he had made a settlement which, upon his death, would carry his estate away from him. The construction of the covenant must be exactly the same in the one case as in the other. The construction of the covenant cannot depend upon the question how it happened that he had no fee-simple in the property. Surely it cannot be questioned that if he had held out fraudulently to the parties that he was entitled to the fee-simple, and had entered into a covenant which, in terms, bound his executors, in that case it would have been binding. And that being so, you cannot hold that it would not bind his executors, because the defect of title has arisen not from his own misconduct, but from acts over which he had no control.

My Lords, I have thought it necessary to state these grounds, but really the case seems to me, with all deference, to resolve itself into the smallest point. There is a covenant by this gentleman, for himself, his heirs and as—

signs, and I cannot doubt that that binds his executors. The covenant is, that it shall be lawful, upon his death and upon the death of his nephew, for the then intended wife, the present Respondent, to enter into and distrain upon certain lands for the annuity of 300*l.* a year. It is not lawful for her to distrain upon those lands, and, surely, upon that the covenant is broken.

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Lord *St. Leonards* :

My Lords, in this case my clear opinion is in favour of the Appellant. I agree with the learned judges, whose assistance the *Vice-Chancellor* had, that we are to ascertain the meaning of the words used to determine the intention expressed, and yet I think that we are not to exclude the nature and object of the instrument in which we are to find those words.

The settlement was made on the marriage of *Robert Monypenny*; and his uncle, *Phillips Monypenny*, agreed to add to his nephew's means of providing for his intended wife and children. *Robert Monypenny*, amongst other properties, had an estate which stood limited, in his favour, to the ordinary uses to bar dower, subject to mortgages for 1,000 *l.* *Phillips Monypenny* had an estate which, in like manner, stood limited to like uses to bar dower, in fee. He was in possession of other considerable estates, of some of which he was seised in fee. But the result of much litigation established, after his death, that he was only tenant for life of the principal part. But even that decision may, perhaps, be yet open to appeal to this House. The settlement recited the several conveyances to bar dower, but without any recital that *Phillips Monypenny* had any other real estates. Then came the recital that he, *Phillips*, proposed and agreed to secure, in manner and subject as *thereinafter was expressed*, after

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the decease of himself and his nephew, in case she should survive them, an annual sum or yearly rentcharge of 300 *l.* for her jointure, to be issuing and payable out of the manors and other hereditaments thereafter charged therewith, and of or to which he the said *Phillips Monypenny* was seised or entitled in fee-simple. And he also agreed to convey and assure his estate which stood settled to uses to bar dower, to the uses and in manner thereafter mentioned.

By the settlement, *Phillips Monypenny* first gives, grants, bargains, sells, and confirms to the intended wife, if she survives him and her intended husband, an annual sum or yearly rentcharge of 300 *l.* to be charged upon and issuing out of certain manors named, and a mansion-house and also all the lands, &c. in several parishes named, "*of or to which he, Phillips Monypenny, or any persons in trust for him, were seised or entitled for an estate of inheritance at law or in equity.*" But this was subject to the mortgage, and also to such annual sum or yearly rentcharge as he had already charged, or should thereafter by his will charge in favour of his wife during her life, and all powers, remedies, and limitations for securing and compelling payment of the same. *Phillips Monypenny* then for himself, *his heirs and assigns*, did covenant, grant, and agree with the intended wife, her executors, administrators, and assigns, that she should have power, in the common form, subject as aforesaid, to distrain for her annuity or rentcharge, in case it should be in arrear for twenty-one days. And also have power to enter on the manors, &c. in case the 300 *l.* a year should be forty days in arrear. *Phillips Monypenny* then grants, bargains, sells, *demises*, and confirms unto trustees, all the estates before charged for a term of 100 years, upon the usual trusts, to receive the rentcharge.

Phillips Monypenny then appoints and conveys, in the usual way, his estate, which stood limited to uses to bar dower, and which I incline to think was, under the general words, charged with the 300 l. a year to the uses thereafter declared.

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Robert, the intended husband, conveys his estate in like manner, and the uses are declared for the benefit of *Phillips* and *Robert*, and the issue of the marriage. *Robert Monypenny* then covenants for *himself, his heirs, executors, and administrators*, with the trustees, their *heirs, executors, and administrators*, that he, *his heirs, executors or administrators*, would make certain payments, in order to discharge the mortgage for 1,000 l.; and *Robert*, for *himself, his heirs, executors, and administrators*, covenants with the trustees, *their heirs and assigns*, for right to convey, and for quiet enjoyment of the estate conveyed by him, strictly confined to the acts of himself, his heirs or assigns, or any person claiming under him or them. This is followed by a covenant by *Phillips Monypenny*, for *himself, his heirs, executors, and administrators*, as to the estate he had conveyed and the acts and deeds relating thereto, and a covenant by *Robert*, for *himself, his heirs, executors, and administrators*, as to the estate he had conveyed, and the acts and deeds relating thereto for farther assurance, strictly confined to their own acts and the acts of those claiming under them.

I have thought it necessary to bring before your Lordships, in this condensed form, all the material contents of the settlement. What then was the intention of the parties? I may observe, that when a man marries, and puts his estate in settlement, he is never made to do more than covenant against his own acts and the acts of those claiming under him. If his title should prove infirm, it would be a family misfortune; but if he had warranted

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his title absolutely, he would be called upon to pay the value of his estates at the very moment that the means of payment, the estates themselves, were taken from him. The practice thus to limit liability would, of course, apply still more forcibly in the case of a relative of the husband's bringing his estate into settlement.

Now, looking at the settlement with the eye of a real property lawyer, I construe it without difficulty. *Robt* bound himself only as to his own acts, and, as to the extent, he of course meant to bind his heirs and personal representatives; apt technical words are throughout introduced for that purpose, and equally fit words are used in regard to the representatives of the persons with whom the covenants are entered into. *Phillips Monypenny* was not required, even as to the estate he conveyed, to enter into any covenant for title, but simply the most limited covenant for farther assurance. Under that covenant if the estate had been recovered by a paramount title he would not have been liable. Now, in regard to the charge of the 300*l.* a year, he entered into no covenant whatever for title, right to convey, quiet enjoyment, or farther assurance, of the lands on which it was charged. It would be singular, therefore, if we should find in the settlement some word which would make him responsible for the title to these lands, in respect to which there was no covenant, or, what would be tantamount, an absolute covenant to pay the annuity during the widow's life, whilst he was under no liability as to the lands in regard to which he had entered into no covenant. So that my noble and learned friends come to this conclusion,—when he has entered into no covenant he is bound, and when he has entered into a covenant he is released.

That limited covenant for farther assurance shows, in

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my opinion, a clear intention on the face of the settlement, that *Phillips Monypenny* should make the provision agreed upon out of his estates, but without any warranty of title on his part beyond his own acts. He reserved to himself power to make unlimited provision out of these very estates for his own wife, in preference to that made for his nephew's intended wife. Of course his wife's provision, the first charge, would fail with his want of title. Is the charge in favour of his nephew's wife, the secondary charge, not to fail with it, but to remain a charge on all his assets? The argument is that the secondary charge is to come absolutely out of all his property, and the primary charge is to fail with his want of title. He makes a much better provision, therefore, for his nephew's wife than he makes for his own wife; yet he reserves an absolute power positively to exclude his nephew's wife from every shilling of the property during his own wife's life if he should think proper. It must not be lost sight of that the throwing the 300*l.* a year upon all *Phillips Monypenny's* assets is tantamount to an express covenant warranting the title upon which it was charged.

What then are the grounds upon which it is proposed to make *Phillips Monypenny's* assets liable for the 300*l.* a year, although his title to the principal estates has proved to be only a tenancy for his own life? For as to the estate of which he was seised in fee, it has been sold, and *Robert's* widow has received the whole of the purchase-money in part discharge of her arrears.

It is said, first, that there is a recital in the settlement that *Phillips Monypenny* is seised in fee of the estates charged. But there is no substantive recital of such a seisin, but merely a statement at the end of the recital that he had agreed to make a charge. It might as well be contended, that the recital of the deed conveying the

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estate to uses to bar dower, was a warranty that it was well conveyed. And if the statement is to be deemed a recital, it is qualified by the statement that he had agreed to secure the annuity in manner and subject as thereafter expressed; and the manner was, after a particular enumeration, to charge all the estates in the several places named, of or to which he or any person in trust for him was seised or entitled for an estate of inheritance in law or in equity. Nothing can be more general. And the case of *Adams v. Gibney* (*m*) is an authority against construing such a recital as an agreement; that is perfectly clear. *Right v. Bucknell* (*n*) is a still stronger authority; for in that there were covenants for title, and the Court of King's Bench held that a recital that he was legally *or* equitably entitled, did not amount to an estoppel.

We have seen that the grant by *Phillips Monypenny* was in the common form, and it is not attempted to be argued that the grant contained any warranty or estoppel. Of course, to the extent of his estate, it operated as a valid charge.

But it is said, that the introductory words to the grant of the powers of distress and entry, which are incidental to the grant of the rentcharge itself, operate as a general personal covenant, binding all *Phillips Monypenny's* assets, and thus going far beyond the grant itself. I have shown to your Lordships, that when it was so intended, both *Phillips* and *Robert* entered into regular technical covenants binding all their assets; nothing was left to conjecture. Now *Phillips* was seised in fee of a portion of the estate, and believed himself to have a similar interest in the other part of it. The actual grant

(*m*) 6 Bing. 656.(*n*) 2 B. & Ad. 278.

of the annuity, as we have seen, bound the estate only. 1861.
 When *Phillips* proceeded to give the usual powers of MONYPENNY
 distress and entry, he, for himself, *his heirs and assigns*, MONYPENNY.
 covenanted, granted, and agreed with the intended wife,
 her executors, administrators, and assigns, that she might
 enter and distrain. Why for himself, his heirs, and
 assigns? That is not the mode in which he covenanted
 for farther assurance of part of the property. He there
 covenanted for himself, his heirs, executors, and admi-
 nistrators. The reason was, that he intended to bind him-
 self, his heirs, and assigns to the charge, that is, that the
 300*l.* a year should charge the estate in their hands,
 but not that he should bind himself and his representatives
 to pay it out of his personal estate, if his title to the
 estate charged should fail. We are bound to give to the
 words their technical import, and their technical import
 carries the clear intention into effect. The covenant with
 the grantee is, as it ought to be, with her executor, ad-
 ministrators, and assigns. But observe the difference.
 The words, "covenant, grant, and agree," are the usual
 words, and amount only to a grant binding the persons
 named, viz., *Phillips*, his heirs and assigns.

The word "covenant" was much relied upon, but it is
 not more powerful than the word "agree." However,
 operation may be given to all the words without carrying
 the grant beyond the intention. Let it be read as a cove-
 nant for himself, his heirs, and assigns, that the grantee
 may enter and distrain, still that would not bind the general
 assets.

According to *Littleton* (o), "if a man gives a power to
 distrain on land for an annual payment, it is a good rent-
 charge." And *Coke*, in his comment on the section (p),

(o) Sec. 221.

(p) Co. Lit. 147 a.

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lays it down that, “ if a man seised of lands in fee bindeth his goods and lands to the payment of a yearly rent to A., this is a good rentcharge, with power to distrain, albeit there be no express words of charge, nor to distrain.” These instances show how the grant and the power to distrain depend upon each other.

It was said that a mere covenant to do a thing will bind the covenantor’s executors without naming them. No doubt; but that does not bear upon this case, for here is a covenant, a portion of a grant of a freehold rentcharge, binding one class of representatives expressly, and carefully excluding the other class.

I hardly know the ground upon which my noble and learned friend on the woolsack puts it. He seems to consider that because a man may enter into a covenant that will bind his executors, therefore a man entering into a charge by a covenant for himself, his heirs, and assigns, will bind all his assets. At this moment I am not at all aware of the real ground upon which this case is to be decided; I do not know whether it is intended to decide it upon the ground that it is a covenant for the title a covenant in effect that the title shall remain liable to the charge, or whether it is intended to construe it to be a common universal covenant for himself, his heirs, executors, and administrators, supplying those words so as to bind all his assets. From what was said by my noble and learned friend, I should rather suppose the latter to be his construction; that is, from these words in the middle of the grant securing this annuity for himself, his heirs and assigns, you are to infer that it is to be extended so as to create a regular covenant, not only for himself, his heirs, and assigns, but for himself, his heirs, executors and administrators, to pay the annuity, whether the estate remains in him or whether he loses it. I think i

is necessary to put the case on the one ground or the other, that the profession may know what is to be the guide.

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But let us proceed to the next provision in the deed. It is a demise of all the estates charged for 100 years; an actual demise. And, consistently with the argument as to the distress, it was insisted by the Respondent that this demise amounted to an implied covenant on the part of *Phillips Monypenny*, that he had power to demise the premises; and that is the third reason in support of my noble and learned friend's decree. But the learned counsel at the bar gave up the point, and he acted wisely in so doing. No doubt the word "*demise*" may create a covenant at law, but in *Nokes'* case (*q*), when the lease contained a covenant by the lessor that the lessee should enjoy the house during the term without eviction by the lessor, or any claiming under him, it was held by "Chief Justice Popham, *et totam curiam*, that the express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties." And *Adams v. Gibney* (*r*), to which I have already referred, shows that, in a case like this, where the estate of the lessor ceased with his life, the executors shall not be charged with the implied covenant, because the covenant in law ends and determines with the estate and interest of the lessor. That is a rule of law; it does not depend upon particular circumstances. It is an abstract rule of law, that if there is a demise, upon which demise at common law there is an implied covenant, that implied covenant is restrained and restricted in the way I have stated. The covenant does not bind them to do more than he himself can do.

(*q*) 4 Co. Rep. 80.

(*r*) 6 Bing. 656.

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It was attempted during the argument to show that a proviso in a grant of an annuity to discharge the person of the grantor would be void; but this cannot be maintained. *Littleton* (*s*) is express, if any authority were wanting; and *Coke's* comment (*t*), which was quoted, only applies where a man grants a rent charge out of an estate wherein he hath nothing, no estate at all, which is not the case before the House.

In the case put by my noble and learned friend who just preceded me, the case of fraud, there is a remedy, but a totally different one. You cannot amend the deed, fraud or no fraud; but there is a different remedy; the remedy would be against the grantor for his fraudulent conduct in granting a charge upon an estate as an unincumbered estate, when he had already mortgaged it to its full value; that case is not without a remedy.

But to return to the precise question. We have seen first, that the grant itself binds only *Phillips Monypenny's* interest in the estate. Nobody disputes that, I apprehend, or can dispute it. Then passing by the second point, to which I will refer presently, I say, thirdly, that the demise operates only on *Phillips's* interest in the estate. Nobody now disputes that. And then if the powers of distress and entry are confined, as they ought to be, both by the words and intention, to *Phillips's* actual interest in the estate, the whole deed will be consistent; but if the second point is decided otherwise, and *Phillips* is held to have absolutely warranted the title to distrain and enter, then this singular inconsistency will be the result. First, the grant will be limited to *Phillips's* interest; secondly, the powers of distress and entry will be considered as granted for the

(*s*) Sec. 220.

(*t*) Co. Lit. 146 a.

whole life of the widow, although of course they cease with *Phillips's* life; and thirdly, the 100 years term which will expire on *Phillips's* death, is still only considered to have been granted by him for that period.

I must observe that the learned Judges who assisted the Vice-Chancellor, treated the question as being whether the rights to enter and distrain were warranted generally; that is, whether the title to the land was warranted. But when the case was before my noble and learned friend, the question appears to have been treated as depending upon an extension of the word "covenant," (although used only with "heirs and assigns") to "executors and administrators," so as to amount to a general covenant for payment of the rentcharge.

As I understood my noble and learned friend on the woolsack, he put it in the same way. Now let us examine it a little; this man did not know that his title to the fee-simple depended upon the construction of a very difficult settlement, which I believe has undergone great consideration, and which may not yet be finally decided. I myself had to decide that case in the Court of Chancery, and found it a very difficult one. He was not aware of that question, and thought he was entitled to the estate. He says, "I will secure the intended wife 300 l. a year out of my estate." He believed that he had the estate to secure that grant; but it turned out that he had only a life interest in it; that was the result after the discussion of a very technical and difficult question, of which he could have no knowledge. He meant to secure to her 300 l. a year out of his estates, but he did not intend to go beyond that. Now supposing that he had left to his children his personal estate, having already secured this annuity to his nephew's wife upon his real estate, did he mean to provide 300 l. a year beyond his actual

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estate for this widow at the expense of his own family? So far from that, he actually has reserved to himself, by the very settlement, the power to give to his wife, in preference to his nephew's intended wife, the amount of property which he thought fit, as an annuity, even to the extinction of every shilling that the nephew's wife could have received. Then what is the ground upon which this decision is to rest. Are you putting it in the way of warranty of title that she shall have that power? Or are you setting it up as an actual independent covenant to pay the annuity? I will venture to say that no man ever saw a deed of this nature, by which you could establish an independent covenant to pay the annuity, extra the charge, where that covenant itself was not to be found expressly on the face of it.

Now look at the difficulty and inconsistency of coming to the other conclusion. Here is a grant, in apt and proper words, of 300*l.* a year absolutely, with no restriction whatever. The law says, that the grant does not go beyond the grantor's actual interest in the estate; it raises no obligation beyond that; it implies no covenant, and it is no warranty of any sort or kind. I grant you what I believe I have, and you have got what I have, you must stand by that as I do; you must stand upon my title. I am acting honestly in giving you my interest, and you have no claim whatever beyond it. But this point is raised because he covenants, grants, and agrees for "himself, his heirs and assigns"—which ought never to be lost sight of—not for "himself, his heirs, executors, and administrators." He has done what he intended to do in a technically right and proper way. Throughout the deed there is not an instance in which there is a mistake; when the man speaks of heirs and assigns in this deed, he knows what he is speaking about. The man who

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framed this deed knew what he was doing, and, therefore, he confines it in the way he does, and does not extend it to his representatives, whom he does not mean to bind. He confines it to those whom he does mean to bind. Then he grants what? the incidental powers. The substantive grant of the annuity itself does not carry with it any liability; but the incidental powers are said to be absolute and positive. He engages that the nephew's wife shall have all this power over the estate. To do what? To recover her annuity, which he has already charged on the estate, but so as not to bind himself beyond the actual estate. But according to the view taken of this case by my noble and learned friends, the remedies are not merely to be co-extensive with the grant, but to go beyond the grant. The grant is found to be infirm, but the remedies are to remain. Then, what follows? There is the term of 100 years. Is not that more important than the power of distress and entry. You may bring an ejectment directly upon the power of entry; you have a clear right to bring an ejectment upon the demise of 100 years. What is the consequence upon this? If you could argue that that demise did in law raise an implied covenant for the title, then you might make something of your second point, but when you feel yourself compelled to withdraw your third point, unfortunately your second point fails from inconsistency.

It is old law, that under a grant of rentcharge the grantee may choose whether he will sue for a writ of annuity against the grantor, or distrain (*u*), but the writ of annuity is implied in the grant (*v*). That writ is now abolished. But observe what the proposed construction of the Respondents would lead to. The grant, although expressly of powers

(*u*) Lit. sec. 219.

(*v*) Co. Lit. 146*a*.

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of distress and entry, would also imply a writ of annuity, as matters stood when the deed was executed, and would also amount to a general covenant binding all the grantor's assets. Yet you are to bear in mind, that although you may raise what you like by implication here, all the powers and all the remedies for securing the rentcharge cease with the life estate; they are gone; therefore you may raise what superstructure the law will permit you, but you cannot raise it upon the estate, because the estate itself is gone.

It was argued at the bar, that a covenant to pay would have been inconsistent on account of the charges and power to create others. But this appears to me to give up the case, for the sole object of the Respondent is, upon insufficient words, to raise or imply a general covenant. But what can be implied can surely be expressed. There was no covenant in the deed to that effect, not because it could not be framed, but because there was no intention on the part of *Phillips* to enter into such a covenant, or on the intended wife's part to require him to do so.

It was then argued, that this was not a legal rentcharge. But it clearly was, as far as the grantor had the legal estate.

Then it was pressed upon us, that the marriage consideration ran through the whole settlement. No doubt; but still the question is, what the wife purchased, for the validity of the consideration is not disputed. In my opinion, it is immaterial that the annuity was not to be enjoyed until after the deaths of *Phillips* and *Robert*.

I have only to add, that Mrs. *Monypenny*'s claim to a writ of annuity ceased by her claiming and obtaining the purchase money of part of the estate, which was well charged with her rentcharge, and she had only the right

of distress and entry left, and that ceased on *Phillips Monypenny's* death. The sole question, therefore, is, did he enter into a general covenant to pay her the annuity without reference to the continuance of his title; or, in other words, did he in effect warrant the title against all the world? I submit to your Lordships that there is no warrant in law for this conclusion, and I therefore think that the decision of the *Vice-Chancellor* should be supported by this House.

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Now, I will tell your Lordships what, in my humble apprehension, will be the effect of the decision that is now to be made in this case. It is against the intention of the deed; it is contrary to the view of conveyancers, and will create some alarm; but they will immediately prepare a clause which they will add to every settlement of this nature, taking care that the grantor shall not be personally liable. Therefore, it will just lead to the necessity of introducing new clauses and lengthening deeds.

My Lords, I need not say, although I have spoken strongly in the case, because I feel strongly, that I do so with the greatest deference for the opinions of my noble and learned friends. It is very usual to say upon these occasions, when you happen to stand alone in a minority, how much you regret to differ from your noble and learned friends. I cannot, with truth, say so upon this occasion, because I think I am right. But I regret very much that my noble and learned friends do not agree with me.

Lord *Wensleydale*:

My Lords, I concur in the opinion expressed by my two noble and learned friends who have preceded me, that your Lordships ought to affirm the decree appealed against. I differ, with great reluctance, from the great authority of my noble and learned friend who has offered

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his advice to the contrary ; but, in the view I take of the question, it is simply one of the construction of the provisions which are in the deed of settlement. It is possible that the parties to this deed may have intended to provide that the annuity of 300 *l.* per annum to be paid to the Appellant, after the death of *Phillips Monypenny* and *Robert Joseph*, her husband, should only be secured on the estates of *Phillips Monypenny*, and that no personal liability should be incurred by him to pay that annuity. Had the intention been that there should be such a personal liability also, it is by no means improbable that a prudent and skilful conveyancer would have framed the deed differently, and would have introduced into the settlement a covenant more distinctly importing the personal liability of *Phillips Monypenny* to pay the annuity.

But in every case of this kind the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in the deed ; a most important distinction in all cases of construction, and the disregard of which often leads to erroneous conclusions. Now, adopting this rule, I feel quite satisfied that the deed contains a covenant, not to pay the annuity so that the arrears might be recovered as a liquidated sum, but a covenant that there should be lawful power and right to levy a distress on the manor of *Maytham*, and the other manors and lands charged with the annuity when it became due, after the death of *Phillips* and *Robert Joseph Monypenny*, the breach of which would entitle the covenantee to unliquidated damages. The manors named in the part of the deed which charges the lands, are *Maytham*, *Nether Forsham*, and *Renshore*, and all other lands in different parishes and places in the county of *Kent*, in which he, or any persons in trust for him, was or were seised of an estate of inheritance at law or in equity.

It may be a question whether this expression applies to the whole of the estates before mentioned, so as to include *Maytham*, or to the other lands only. If *Maytham* is not included, then the covenant, that the Appellant should have lawful power to distrain, amounts to a covenant that he had or would have such a legal estate in *Maytham* as to authorise a distress, after his death, for the arrears of the annuity after it became due. If it applies to the whole of the estates, including *Maytham*, then it amounts to a covenant that he had or would have such an estate in law or equity therein as that a distress might be lawfully made.

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I think it clear that there is a covenant that there was, or would be, when the annuity should become due, a title in the settlor, either at law or in equity, to make a distress lawful on all the estates, subject to farther charges which he might make; consequently, that the covenant was broken, as he had no title, legal or equitable, in the *Maytham* estate when the annuity became payable.

It seems to me that the learned Barons who assisted Vice-Chancellor *Wood* in hearing this case (the question being considered by him, and justly, as a purely legal one, depending upon the construction of the deed only), have fallen into a mistake in refusing to give full effect to the words "covenant and agree," according to their ordinary meaning, and in supposing them to be only equivalent to the word "grant." I feel no doubt that there is a covenant that a distress should be lawful for the arrears of the annuity, which would not become due till after the death of *Phillips Monypenny*.

The covenant for himself must make his executors liable, unless there is some context to qualify it. The mention of heirs and assigns only, and not executors, commonly inserted in all deeds charging the person, and inserted in the covenant by *Robert Joseph*, may raise a

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suspicion that the framer of the deed might mean his personal estate not to be liable after his death. But it is suspicion only, and to give effect to his covenant for himself, it must be held that the executors are liable; I do not see how he himself could be liable at all during his life, for even the conveyance of the estate by him to a third person, as suggested by Mr. *Baggallay*, would not be a breach of the covenant, for *non constat* that he might not repurchase it, or secure a power of distress on it, before the annuity was payable; and the addition of the word "heirs," is to be explained by the intention to make his own real estate, wherever situate, subject to the covenant, which it would be, though resulting in unliquidated damages since the 1 *Will.* 4, c. 47; and the assignees are added, if with any intention, probably with the ineffectual one of binding the assignee of the land by the covenant for title.

Upon this clause, on which the argument at the bar principally turned, if it stood alone, I feel no doubt that, upon its true construction, there is a right of action against the executors of *Phillips Monypenny* for his breach of covenant, by want of title to the estate of *Maytham* at the time the annuity became due.

Is there anything in the context to alter this construction? All agree that the whole deed may be looked at in order to arrive at the true construction of one clause. I think there is nothing whatever in the other provisions of this deed which is in the least inconsistent with the covenant contained in this clause. Every part of the deed may have its full effect, construing the clause as a covenant for title. All that can be said raises only a doubt whether the parties have so framed a deed as to express what they meant.

Mr. *Phillips Monypenny* most probably believed that he had a good title in fee simple to the *Maytham*

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estate, and, therefore, could with perfect safety covenant for lawful power to distrain upon it without incurring any personal liability, which I think it clear he has done, and that his executors are liable to pay out of his estate the damages sustained by reason of his breach of that covenant.

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Lord Chelmsford: My Lords, I will content myself with saying, that I agree with my noble and learned friends, who are of opinion that the decree ought to be affirmed.

Mr. Daniel: My Lords, in this case the personal estate is proved to be insufficient for the payment of the arrears due; I would, therefore, ask your Lordships for the costs of the Appeal.

Lord St. Leonards: There should not be any costs, I think.

The Lord Chancellor: I think it should be without costs.

Lord Cranworth: That, I suppose, is upon the principle, that where there is a difference of opinion in the House there should be no costs.

The Lord Chancellor: I think so.

Order affirmed, and Appeal dismissed without costs.

Lords' Journals, 26 February 1861 (w).

(*w Monypenny v. Dering*.—This case was proposed to be brought up by Appeal, but the *Lord Chancellor* having in 1859 refused leave to enrol the decree after the time allowed by the general orders of the Court of Chancery of 1852, a petition for leave to appeal was presented. After this petition had been presented, the case of *Beavan v. Lady Mornington* (*ante*, Vol. 8, 525) was heard and decided.

Mr. Clement Berkeley now (June 6, 1861) appeared at the bar, and announced that he could not hope to establish any distinction between the two cases.

The appeal was ordered to be dismissed with costs.

LORD BRAYBROOKE - - *Appellant.*

The ATTORNEY-GENERAL - *Respondent.*

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Duty.*

"Predecessor."

"Successor."

"Deprived."

*Tenant in
Tail.*

A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, and resettling the estate in his own favour. The person from whom he derives the estate is his "predecessor."

Devise in 1796 of certain freehold estates to *A.* for life, remainder to his eldest son *B.* for life, remainder to the first and other sons of *B.* in tail male. In 1841, *A.* being then tenant for life in possession, *A.* & *B.* executed a disentailing deed, to which two other persons were parties as trustees, and granted to the trustees, to hold, subject to the life estate of *A.*, to such uses as *A.* and *B.* should appoint, and in default, if *B.* should survive, to such uses as he should appoint, and in default to *B.* for life, and to his first and other sons in tail male. In 1850, by another deed which recited the former, and by which *A.* brought new estates into settlement, and discharged all the estates from a charge of 10,000 *L.*, and *B.* gave up advantages to which he was entitled, an annuity to *B.* during the life of *A.* was charged upon all the premises, and subject thereto, they were appointed to *A.* for life, remainder to *B.* for life, remainder to the use of his first and other sons in tail male:

HELD, affirming the judgment of the Court below, that these deeds must be taken as having been executed on the same day, that they constituted (*diss. Lord Wensleydale*) within the 12th section of the 16 & 17 Vict. c. 51, a disposition made by *B.* in favour of himself, and made out of the estate to which he was entitled under the will of 1796, that consequently his "succession" must be treated as happening under that will, and he was liable thereupon to the amount of duty chargeable in respect of his succession to the testator, on a disposition made under it by himself.

And (*diss. Lord Wensleydale*) the nature of the consideration upon which the disposition was made did not affect the question.

The annuity, according to the terms of its creation, ceased on the death of *A.*, at which time *B.* entered into possession of the estates:

HELD, varying the judgment of the Court below, that he was entitled under the 38th section of the Act to an allowance as on account of property of which he had been "deprived" within the meaning of that section.

The Succession Duty Act is not to be construed according to the

technicalities of the Law of *England* or *Scotland*, but according to the popular use of the language employed.

Per Lord *Campbell* (Lord Chancellor) : The protector of a settlement giving his consent to a disposition of property cannot be treated as a creator of such disposition.

Two deeds, though executed at an interval of nine years from each other, may be treated as constituting one disposition. And what is done under a power of appointment is to be referred to the deed creating the power.

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THIS was an appeal against a decision of the Court of Exchequer as to the amount of succession duty payable by the Appellant, under the following circumstances:—

Lord *Howard de Walden* was, in 1788, created Baron *Braybrooke*, with remainder in the barony, in default of male issue, to his cousin, *Richard Aldworth Neville*, and the heirs male of his body. In an information filed by the *Attorney-General* against the present Appellant, it was stated that, in 1796, Lord *Howard de Walden* devised certain estates, known as the *Audley End* mansion estates, to the said *R. Neville*, for life, remainder to the use of his eldest son, *Richard Neville*, for life, with remainder to the first and other sons of the body of the said *Richard Neville* successively, according to seniority, in tail male. The testator died 25 May 1797, and *Richard Aldworth Neville*, who afterwards took the surname of *Griffin*, succeeded him in the barony, and became the second Lord *Braybrooke*. He died in 1825, and his eldest son, *Richard* (the second tenant for life mentioned in the will), succeeded him, and became third Lord *Braybrooke*. His eldest son, *Richard Cornwallis Griffin* (the present Appellant) was born in March 1820. In 1841 *Richard*, the third Lord *Braybrooke*, and *Richard Cornwallis*, the Appellant, were respectively tenant for life in possession, and tenant in tail in remainder of the *Audley End* man-

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sion estates, under the will of the testator, and they joined in executing a disentailing deed, dated 21 *July* 1841. The deed was expressed to be between *Richard Griffin*, the third Lord *Braybrooke*, of the first part; the Appellant of the second part, Lord *Lyttelton* and the Hon. *R. N. Lawley*, of the third part; and it was witnessed that, for the considerations therein mentioned, the Appellant, with the consent of Lord *Braybrooke*, as protector of the settlement, granted unto Lord *Lyttelton* and Mr. *Lawley*, their heirs, &c., all and singular the manors and other hereditaments therein mentioned (including the *Audley End* mansion estates), which then stood limited at law or in equity to the Appellant, to hold the same, subject to the estate for life of Lord *Braybrooke*, and to any term of years precedent to the estate tail of the Appellant, to such uses as Lord *Braybrooke* and the Appellant should, by any deed, &c., with or without powers of revocation or new appointment, from time to time, direct and appoint; and, in default of such appointment, to such uses as the Appellant, in case he should survive Lord *Braybrooke*, should, by deed or will appoint, and in default, &c. to the Appellant for life, with remainder to his first and other sons in tail male. This deed was duly enrolled. On the 1st *January* 1850 Lord *Braybrooke* and the Appellant executed a deed of appointment, the parties to which were Lord *Braybrooke*, of the first part; the Appellant, of the second part; Lord *Lyttelton* and Mr. *Ralph Neville*, of the third part; and Lord *Lyttelton* and the Hon. *Robert Neville Lawley*, of the fourth part. This deed, after reciting that Lord *Braybrooke* and the Appellant had agreed to settle, as well the hereditaments comprised in the first and third schedules thereto, comprising the *Audley End* mansion estates, and also the ancient estates of the family of

Neville, as those of which he was seised in fee-simple or otherwise, and which were set forth in the second and fourth schedules thereto, witnessed (amongst other things) that, in pursuance, &c., they, Lord *Braybrooke* and the Appellant, in exercise and execution of the power or authority limited in the deed of *July* 1841, limited and appointed all and singular the manors and hereditaments comprised in the first schedule, and all the lands and hereditaments whatsoever in the counties of *Essex*, *Cambridge*, and *Suffolk*, comprised in or then subject to the uses and trusts of the deed of *July* 1841 (except as therein mentioned), freed and discharged from a charge of 10,134 *l.* 5 *s.* 8 *d.* (stated to be the absolute property of Lord *Braybrooke*), to such uses, upon such trusts, &c., as were thereafter expressed concerning the same. And, in consideration of the premises, Lord *Braybrooke* and the Appellant granted and released (according to their several estates and interests) unto Lord *Lyttelton* and Mr. *Neville*, their heirs, &c. the said manors, &c. therein before appointed, to hold the same to the uses, &c. thereafter limited and declared. And all leases and agreements for leases made by Lord *Braybrooke*, were confirmed; and the manors, &c. were subjected to such trusts as Lord *Braybrooke* and the Appellant should jointly appoint; and, in default of such appointment, that the Appellant, during the joint lives of Lord *Braybrooke* and himself, was to receive a rentcharge of 700 *l.* a year; and if the Appellant should marry, a rentcharge of 1,200 *l.* a year, charged upon all the premises thereinbefore appointed, and, subject as aforesaid, the premises, &c. were to be to the use of Lord *Braybrooke* for life; remainder to the use of the Appellant for life; remainder to the use of his first and other sons in tail male.

Lord *Braybrooke* (the third Peer) died 13th *March*

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1858, and the Appellant succeeded to the barony and the estates. The *Attorney-General* alleged that the Appellant was in a degree of collateral consanguinity to the testator, who was his “predecessor,” other than any one of those described in the tenth section of the 16 & 17 *Vict.* c. 51, and was consequently liable to a duty of ten per cent., under the 12th section.

The Appellant put in an answer, which admitted, or restated, many of the facts set forth in the information, but added the following:—

Between 1841 and 1850, Lord *Braybrooke* and the Appellant, under their joint power, sold parts of the estates. The *Audley End* mansion estates included the presentation to the mastership of *Magdalen College, Cambridge*. The third Lord *Braybrooke* (the Appellant's father) was seised of estates which he had himself purchased, and which were called the “*Audley End* purchased estates,” of the ancient estates of the *Neville* family, called “*Billingbear* old estates,” and likewise of others which he had purchased, called “*Billingbear* purchased estates.” He was also possessed, absolutely, of a sum of 10,134 *l.* 5 *s.* 8 *d.* charged by way of mortgage on the *Audley End* mansion estates, and of the sums of 5,000 *l.*, 5,000 *l.*, and 6,000 *l.*, charged on the *Billingbear* old estates. The *Audley End* mansion estates were of the value of about 180,000 *l.*, the *Billingbear* old estates of the value of 300,000 *l.*, and the *Audley End* and *Billingbear* purchased estates of about 90,000 *l.* Just before the execution of the deed of 1850, the Appellant and his father had at their disposal shares to the amount of 7,400 *l.* in the *London and North Western Railway Company*, and 135 extension shares of the *York and North Midland Railway Company*. That “Lord *Braybrooke*, with the view of inducing me,” the Appellant, “to concur with him in exercising the joint

power of appointment created by us over the *Audley End* mansion estates, proposed to me, that if I would give up the absolute power of disposition reserved to me by the indenture of *July* 1841, and, in favour of his younger sons, the next two presentations to *Magdalen College*, and would join with him in a settlement of the estates over which we had a joint power, he would in such settlement settle the *Audley End* purchased estates, the *Billingbear* old estates, and *Billingbear* purchased estates, and would make an immediate provision for me during his lifetime." The Appellant agreed to these proposals, and in pursuance of them the deed of *January* 1850 was executed. By that deed the *Audley End* mansion estates were discharged of the 10,134 l. 5s. 8d. charged on them by way of mortgage; the *Billingbear* old estates were discharged of the sums of 5,000 l., 5,000 l., and 6,000 l., charged in like manner on them, and these three sets of estates, and the *Billingbear* old estates, and the *Billingbear* and *Audley End* purchased estates, were, together with the *Audley End* mansion estates, all settled on the same trusts as the *Audley End* mansion estates had been, and the stock in the railway companies was to go along with these settled estates. There was a power in the deed for the Appellant to raise a sum of 10,000 l. for his own use, and a farther sum of 10,000 l. for his own use if he should have no children who should succeed to the said estates, to jointure his wife and to raise portions for younger children, both of which powers he exercised on his subsequent marriage. There was also a power to the third Lord *Braybrooke* to give to any of his younger sons the next two presentations to *Magdalen College*, and to the rectories of *Haydon* and *Widdington*, and to grant *Haydon House* and twenty acres of land to his son, the Hon.

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Charles Cornwallis Nevill, for life, all which had been done.

The Appellant, under these circumstances, insisted that his own father, and not the testator, must be treated as his "predecessor," or that his father and himself were joint predecessors under the 13th section; and he besides claimed an allowance to be made to him in respect of the annuity of 1,200*l.* of which he was, in the words of the 38th section of the Act, "deprived" on coming into the succession.

The Court of Exchequer held that the Appellant took a succession under a disposition made by himself within the 12th section of "the Succession Duty Act, 1853," the testator being his "predecessor," and was therefore chargeable with duty at 10 per cent., and also that he was not entitled under the 38th section to any allowance in respect of the 1,200*l.* a year which ceased on the death of his father (*a*).

(*a*) 5 Hurl. and Norm. 488.

The sections relating to the subject matter of this appeal are the following :—

Section 2. Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition or devolution, a "succession;" and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote settlor, disponent, testator, obligor, ancestor, or other person, from whom the interest of the successor is or shall be derived.

Section 12. "Where any person shall take a succession under a

Mr. *Rolt* and Mr *C. Hall* for the Appellant :

The decision of the Court below cannot be supported in its terms. That Court decided that the resettlement amounted to nothing but a mere family arrangement, that a mere family arrangement could make no difference in such a case, and that the predecessor of the Appellant was the testator of 1796. The *Attorney-General* does not pretend to support the decision in that form ; he says that the Appellant now took an estate which was carved out of that which he before possessed, and so came within the 12th section. That argument can hardly be maintained unless the Respondent is prepared to contend that a person coming in under a resettlement of a nature entirely different from that which before existed, is to pay the same rate of duty as if no alteration whatever had been made, but the original settlement had remained in force. The real question is not from what estate, but from what person, is the succession derived. In *Lord Saltoun v. The Advocate-General* (b), it was held that disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died, during the continuance of such disposition, he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made ; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself."

Section 13. "Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the Commissioners to agree with the successor as to the duty payable."

Section 38. "Where any successor upon taking a succession shall be bound to relinquish or to be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect to the value of such property."

(b) 3 Macq. Sc. App. Cas. 659.

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“predecessor” means the person from whom the interest is derived.

In this case that person is the Appellant’s father, and the succession comes to the Appellant under the deed of 1850. Or if not the father alone, then it comes from the father and the Appellant jointly. The deed of 1850 was made by two persons having an absolute control over the fee. It was made under the authority of a general power of appointment, and the fourth section of the Act shows that the person exercising a general power of appointment is to be deemed the predecessor; under such a power he may make a disposition in favour of himself. This power was a general power, and so exercised by the Appellant and his father; and such considerations passed between him and his father who was in the situation of protector of the settlement, that the son took an estate entirely different from that which he would have taken under the testator’s will. This is a “disposition” in the strongest sense of that word; and it is a disposition made by the two persons jointly in virtue of a joint power previously existing; it is a bargain and sale. It might have been a disposition in favour, not of the Appellant, but of his youngest brother, or of any stranger. From whom in such a case would the succession have been derived? Certainly from those who, by the deed of 1850, under the power created by the deed of 1841, made the disposition. The case of *The Attorney-General v. Sibthorp* (c) is not applicable here, for in that case there was not, as there is here, a disposition as by bargain and sale, and the execution of the two deeds took place on the same day, and formed but one transaction. Here the son was for nearly ten years entitled to 1

(c) 3 Hurl. & Nor. 424.

absolute ownership of the estates, and at the end of that period by a disposition, upon considerations passing between himself and his father, and under a joint power created ten years before, they jointly agreed to resettle the estate in a different manner, and the son cut down his absolute estate to a mere life estate. This was in all respects a different estate from that to which the son was entitled under the testator's will, and it was created by a power independent of that will. The case of *The Attorney-General v. Baker* (*d*), is applicable here, and the father and son must be deemed the settlors; *Re Jenkinson* (*e*) illustrates the same argument.

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It cannot be said that the beneficial interest here is carved out of the previous estate of inheritance in fee tail, because, by the disentailing deed of 1841, the parliamentary power of conveyance given by the Fines and Recoveries Act had been executed, and a new estate in fee was created. Then the deed of 1850 limited the uses of that estate which had been created by the deed of 1841. The succession is not to the old estate, but to the new estate thus created. But even if the beneficial interest was created out of the original estate tail, it was not created by the Appellant alone, but by him and his father; and therefore falls within the thirteenth and not within the twelfth section of the statute, so that at all events the Appellant is only liable to one per cent. duty on the moiety which he must be taken to have derived from his father.

Then as to the other point. The Appellant was "deprived" of the annuity within the meaning of the thirty-eighth section of the statute, and is entitled to an allowance in respect of it. The argument on the other side is, that he was only entitled to the annuity during the

(*d*) 4 Hurl. & Nor. 19.

(*e*) 24 Beav. 64.

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life of his father, and at his death it came to its natural termination, so that he lost it by the death of his father, and by nothing else. But if a person has property for the life of *A.*, it is impossible to say that he is not deprived of it by the death of *A.* *In re Micklethwait* (*f*) decided that where an annuity was granted to a person for his life, but it was provided that if the grantee should by the death of an elder brother come into possession of certain estates, the annuity should cease, he must on the death of such elder brother be deemed to have been deprived of the annuity within the words of the Act, and therefore to be entitled to an allowance.

[The *Lord Chancellor* : Is not that case overruled by *The Attorney-General v. Sibthorp*? (*g*).]

It was distinguished from the other by Mr. Baron *Bramwell* (*h*), on the ground that in *Micklethwait's* case the annuity was determinable on a contingency, namely the coming into possession of certain property. So that on this point, *Sibthorp's* case does not apply to the present. Here the Appellant is "deprived" of the annuity, and is therefore entitled to the allowance.

The Attorney-General (Sir *R. Bethell*), and Mr. *Hanson*, for the Crown:

The question is, from whom has the interest now challenged been derived? For the "predecessor" is the person whom the Act treats as having conferred the interest: the "successor" as the owner coming into possession of that interest; and a "succession" as a beneficial interest falling into possession on the death of some person dying after the commencement of the Act. It is a clear enactment of the statute, that where the succession is nothing

(*f*) 11 Exch. Rep. 452.

(*h*) 3 Hurl. & Nor. 451.

(*g*) 3 Hurl. & Nor. 424.

out a modification of the ownership possessed at the time of the disposition, by the person who so modifies it, that succession shall be subject to the same duty as the estate from which it is derived. That is clearly the effect of the 12th section. Where, as in this case, it appears on the face of the disposition itself that the succession is a thing created by the act of a person now claiming that succession, the Court must go back to the instrument creating the interest or power by which the succession itself is created. It is nothing that a few years have elapsed between the execution of the two deeds; they must be taken together, and they constitute one complete transaction. *The Attorney-General v. Sibthorp* (i) is therefore strictly applicable. If what was done here in 1850 had been done in 1841, no one would have denied that the whole transaction rested on the will of Lord *Howard de Walden*.

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The 13th section has no application to a case like the present. That was intended to apply where the successor was a person perfectly distinct from any of the predecessors, or where the amount of interest of each predecessor is unknown. As, for example, *A.* claims an interest in an estate; *B.* is in possession of it; *C.* sets up a title to part of it; they arrange among themselves, and whoever takes under that arrangement, cannot say from whom the interest is derived; it is not "distinguishable," for on the face of the instrument setting forth the claims and their arrangement, it would appear that it was impossible to be ascertained to whom the estate belonged.

The statute relates to cases where the interest is passed by disposition, not to the power exercised. Powers are divisible in the 4th section, into two classes: a limited, or trustee, power, which is to be exercised in favour of

(i) 3 Hurl. & Nor. 424.

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certain objects, who become successors when the power has been exercised in their favour, and a general power which is subject to no such restriction. Neither of them represents the power which is said to have been exercised in this case, but each was intended to apply to a state of circumstances entirely different from the present. It was because the Court of Exchequer in *The Attorney General v. Baker* (j), considered Mrs. Smith to be the actual settlor of the property, which she had not obtained as a bounty, but on the compromise of a claim of right, that the duty was reduced to the lowest amount. That case is, therefore, not an authority for the present Appellant. But *Lovelace's case* (k), expressly laid down a rule which is applicable here, namely, that appointees under a general power of appointment are included in the section, for that it cannot be said that they are not entitled by reason of the disposition which created the power. Taking that as the rule, it follows that this Appellant is entitled under the disposition made by Lord Howard de Walden, to which the estate and the power to deal with it owed their existence.

Then as to the claim for allowance on the annuity ceasing. The statute only intended to make an allowance for what one man lost and another got. In such a case there would still be somebody liable to be taxed; but it did not intend that any allowance should be made when the thing by the natural course of events, and according to the very terms of its creation, ceased to exist. Here the Appellant is not "deprived" of any thing; by the very terms of its creation it is gone; it is not possessed by any one; the succession to the estate did not put an end to the annuity; it has died a natural death.

(j) 4 Hurl. & Nor. 19.

(k) 4 De G. & Jon. 340.

If the reversionary interest had been sold by the Appellant, the purchaser would not have been entitled to the allowance. The case of *Micklethwait* (*l*) is, therefore, inapplicable to the present. The 38th section was never intended to grant an allowance in a case of this kind.

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Mr. Rolt, in reply :

Power, as well as property, may constitute predecessorship. Where the interest is derived from the exercise of a power, the power is equivalent to property, and the person who possesses the power is the predecessor within the meaning of the statute, for from him is the estate derived: *The Attorney-General v. Baker* (*m*). It may be admitted, that where a succession is merely the modification of an interest possessed by the predecessor, that succession shall be submitted to the same rules as the estate out of which it issued; but it is only so where the modification is made by that person alone who possesses the original estate, not where it is made by agreement between himself and another person, and on valuable consideration.

[The Lord Chancellor: If the mere consent of the other person is required, is not that a modification by himself alone?]

No; consent is equivalent to power; a power to *A.*, to be exercised with the consent of *B.*, is a power in *B.* The Crown cannot inquire into the title on which the deed of 1850 was made, and the Appellant stands exclusively on that deed. That is a deed made under a joint power of the father and son, and they are the "predecessors." Here the remainders over were destroyed, and a new estate was created. It was so even with regard to

(*l*) 11 Exc. Rep. 452.

(*m*) 4 Hurl. & Nor. 19.

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the father, who, though he took back the life estate, took it back subject to the rentcharge of 1,200 *l.* a year. The 13th section is strictly applicable to this case; it was intended to meet cases where there were possible disputes between father and son, which were arranged by a new settlement of the estate, and not merely cases where the interests of the parties were incapable of being ascertained.

Then as to the other point. “Relinquish” is the word in the 38th section applicable to the cases supposed on the other side. “Deprived” is the word properly applicable to cases like the present. The Appellant was here deprived of the annuity. Here was an annuity for life, or rather two lives, to cease on the happening of a particular event. On the happening of that event, the parties previously entitled to it were deprived of it.

The Lord Chancellor (Lord *Campbell*):

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My Lords, in this case it is admitted that the Appellant, who succeeded to the *Audley End* estates on the death of his father, since the 16 & 17 *Vict.* c. 51, “the Succession Duty Act,” came into operation, is liable in respect thereof to the succession duty; and the question is, at what rate the succession duty to which he is liable ought to be calculated?

As the Appellant certainly took by “disposition,” not by “devolution,” we have only to consider by whose disposition he took.

Had the Appellant not thought fit to execute the disentailing deed of 1841 and the deed of appointment of 1850, he certainly would have taken under the provision made by the will of Lord *Howard de Walden*, under which the Appellant took by purchase an estate tail in the *Audley End* estates, expectant on the death of his father, the third Lord *Braybrooke*, who took a life in-

terest in them; and he would unquestionably have been liable to succession duty at the rate of ten per cent.

Both those deeds were valid, operative deeds, and full effect is to be given to them. I regret, my Lords, that a good deal of confusion has arisen in this case from not giving full effect to these deeds. Giving full effect to them, under whose disposition did the Appellant take? I say, under his own.

I would beg leave to remind your Lordships of what all your Lordships who gave an opinion in the *Saltoun case* observed, that this statute, which, by the same enactments, imposes a tax on successions in every part of the United Kingdom, is to be construed, not according to the technicalities of the law of real property in *England* or in *Scotland*, but according to the popular use of the language employed; so that all such property may be subject to the succession duty, according to the general intention which the legislature has expressed.

I must farther remark, that although the Act only came into operation on the 19th of *May*, 1853, the liability to duty on subsequent successions depends upon the operation of wills and deeds made and executed previously, as if they had been made and executed subsequently; so that the decision of your Lordships in this case will be a binding authority as to the construction of the Act in all similar cases which may hereafter occur.

Now, my Lords, did not the Appellant take the *Audley End* estates, in popular language, and *substantially*, under a disposition made by himself? Has he not throughout been disposing of the interest he took as tenant in tail under the will of Lord *Howard de Walden*? Is it not a new disposition by him of the same property?

Look first to the disentailing deed of 1841. Was not

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this a disposition by him of his interest as tenant in tail for his own benefit? His father, as tenant for life and protector of the settlement, joined in the deed, and his consent was necessary. But the father retained his life interest; and the son's interest as tenant in tail alone was really affected. It cannot be argued that a person, whose consent is necessary to a disposition of property, makes that disposition.

New legal interests were taken; but are we to construe this statute with the strictness of the old law, according to which, if a testator, after making his will, suffered a recovery to give effect to the will, the will was thereby revoked, the testator, by the recovery, being no longer seised of the estate he had devised? The subject matter dealt with by the disentailing deed was the estate tail in the *Audley End* estates devised to the Appellant by Lord *Howard de Walden*; and it still remained the same subject matter when, by the act of the Appellant, different legal interests were taken in it. These interests were all clearly taken by his provision.

Although there was a joint power of appointment in the father and the son, that power of appointment could not have been exercised without the son's concurrence. In default of appointment, an estate for life was limited to the son, remainder to his first and other sons in tail.

I cannot doubt that if the father had died without any deed of appointment being executed, the Appellant must have been considered as taking the succession under a disposition made by himself.

We have, therefore only farther to consider the effect of the deed of appointment of 1850. Although nine years intervened between the two deeds, I think they are to be construed as if they had both been executed on the same

day, and that in truth they constitute one disposition. What is done under a power of appointment is to be referred to the deed by which the power was created.

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There were (as there always are when an estate tail is barred by the son, tenant in tail, with the consent of the father, tenant for life) stipulations between father and son as to benefits which they are reciprocally to confer and to receive. But this was substantially a disposition of the interest in the *Audley End* estates which was vested in the Appellant as tenant in tail, for the father's estate for life remained untouched.

The joint power of appointment reserved to father and son is not intended as a matter of pecuniary value to the father, but only as a check upon the son, that he may not in his father's lifetime make any imprudent disposition of the family property. The father had no interest in the *Audley End* estates beyond his own life interest, and to this the power of appointment had no application.

In the present case we have only to consider the duty payable in respect of the *Audley End* estates, which were included in the deed of appointment; and I do not think that any regard is to be had to the other estates which the father brought into the settlement, however valuable they might be, or to the annuity charged on the life estate, or to the arrangement about the mastership of *Magdalen College*, or the family livings. Detached from all these particulars, there was a disposition of the Appellant's interest in the *Audley End* estates, and, as far as the *Audley End* estates are concerned, this disposition was made by the Appellant himself.

The 12th section seems to me to have been framed precisely to meet such a case.

Some confusion has been introduced into the subject by supposing that this succession might be brought within

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the second section of the Act, entirely ignoring the disentailing deed and the deed of appointment, or considering them only as "modifications" of the original settlement; the inference being that the original settlor may still be treated as the direct predecessor of the Appellant, in the same manner as if the entail had remained in full force till his father's death, when the succession took place.

In *The Attorney General v. Sibthorp*, such suggestions appear to have been made both from the bar and from the bench; but, according to the report of the case (*n*), the *ratio decidendi* was, "that the Defendant took a succession under a disposition made by himself, within the meaning of the 12th section of the Succession Duty Act, 1853." Mr. Baron *Bramwell* there says, referring to other sections of the Act, "My decision does not proceed on either of those sections, but on the 12th, the argument upon which seems to me unanswerable."

In the present case we must consider under what disposition the succession did take place. A new disposition having been made, creating quite different interests in the estates from those created by the will, the testator can no longer be considered the predecessor.

The object of the 12th section was, to prevent any one with a vested estate tail in remainder, from diminishing, by his own act, the rate of succession duty to which he would be liable if he did not deal with the estate till it vested in possession.

The deeds of 1841 and 1850 make one disposition of the estate tail. At the date of such disposition, the Defendant was entitled to the property comprised in the succession expectant on the death of his father, who died during the continuance of the disposition, and after the

(*n*) 3 Hurl. & Nor. 424.

time appointed for the commencement of the Act. Therefore the Defendant is chargeable with duty on his succession at the same rate as if no such disposition had been made, *i. e.*, as if he had succeeded to the estate tail under the will of Lord *Howard de Walden*. To fix this rate of duty we have only to see who would have been the predecessor if the disentailing deed had not been executed.

As succession duty is certainly payable, and section 2 does not apply, it seemed to be admitted at the bar that the case would come within the 12th section, unless it can be brought within the 13th section; and on this section the counsel for the Appellant almost exclusively relied. But the 13th section seems to me to have been framed to meet a totally different state of things. For here the successor derives from his father no portion of the interest in the *Audley End* estates he took by the disentailing deed and the re-settlement; and the interest which he took from the father is not “distinguishable” (the word used in the 13th section), because there was no such interest in existence. This is not a case where the successor has derived his interest in the *Audley End* estates from more predecessors than one.

The question has been asked, what would have been the effect of the joint power of appointment being executed in favour of a stranger? That stranger, on taking the succession, would have been in a totally different position from the Appellant; and as he would clearly have taken under the disposition of others, the duty to be paid by him would depend upon totally different considerations.

A seeming hardship is urged, because the Defendant, who has succeeded his father and his grandfather in the occupation and enjoyment of the *Audley End* estates, is charged with duty at the rate of 10 per cent. But it

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must be recollected that he took the *Audley End* estates by purchase from Lord *Howard de Walden*, who was so distantly related to him, that the rate of duty is the same as if they had been strangers in blood to each other, and that he is only charged at the same rate as if he had succeeded under the will of Lord *Howard de Walden*, without his voluntary act of barring the entail.

I consider it my duty to remind your Lordships of the extreme inconvenience which may arise from departing from the broad rule laid down by the Court of Exchequer, that a tenant in tail in remainder cannot vary the succession duty to which he will be liable, by barring the entail and re-settling the estate. Much uncertainty, much temptation to attempt an evasion of the duty, and much litigation would arise, if regard is to be had to the terms on which, in each particular instance, the estate is re-settled. The tenant in tail in remainder, when he bars the entail, may if he pleases alienate the estate, and no succession duty will be payable by him; but if he re-settles the estate so that he himself shall succeed to it on the death of the tenant for life, he must then pay the same succession duty as if he had taken under the original settlement.

This rule seems clear, easily to be applied, and not productive of any hardship beyond that felt from all fiscal impositions. In construing such statutes, we cannot consider what is fair and what is oppressive in taxation, except with a view to get at the probable intentions of the legislature where a doubt arises. But the legislature, having certainly enacted that in respect of property to which an individual is to succeed by the bountiful provision of another, succession duty is to be paid at a fixed rate, no oppressive character can be imputed to the legislature, if it be supposed that by a subsequent enactment

it is provided that when this succession vests in possession, the individual who takes it shall be liable to pay that same rate of succession duty, although he may, by his own act, have taken what in point of law is a different interest in the property, and directed how the whole of the interest in the property shall hereafter be enjoyed.

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For these reasons, I am of opinion that, as far as relates to the rate at which the succession duty is to be paid, the judgment of the court below ought to be affirmed.

I ought to mention, that since this opinion was written, by the courtesy of my noble and learned friend *Lord Kingsdown*, my attention has been particularly drawn to the fifteenth section of the Succession Duty Act; and although I adhere to the construction I had put upon the twelfth section, I think that the decision of the court below may be supported by the fifteenth section, which may have been introduced to guard more cautiously against the rate of duty on succession being diminished by any intervening disposition of the settled property.

As to the allowance for the annuity, after doubt, and with hesitation, I differ from the construction put by the court below on section 38, which enacts that “where any successor, upon taking a succession, *shall be bound to relinquish or be deprived of* any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property.” The objection to the claim made by the Defendant for an allowance in respect of the annuity of 1,200*l.*, payable to him out of the *Audley End* estates, during the joint lives of his father, and himself, is, that this annuity no longer existed when the Defendant took the succession on which the duty is to be assessed, the annuity having then come to an end by his father’s death. If the section had

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only contained the words, "shall be bound to relinquish any other property," I should have readily yielded to the argument that this could only apply to property which still exists; but the words "*or be deprived of*," are added and I cannot certainly say that the Defendant has not been *deprived* of the annuity, by its coming to an end at the same moment when he succeeded to the *Audley End* estates, out of which the annuity was payable.

I ought to add, that I entirely approve of the decision of the Court of Exchequer in *Re Micklethwait*, which was questioned by Lord Chief Baron Pollock, in *Attorney-General v. Sibthorp*; and although the *Micklethwait* case may be distinguished from the present, the reasoning of the learned Judges who decided it tends to favour the construction which I am now induced to put upon the thirty-eighth section.

I must, therefore, advise your Lordships to affirm the judgment of the Court of Exchequer as to the rate of duty to be charged, and to reverse it as to the allowance for the annuity.

Lord Wensleydale :

My Lords, I entirely concur in that part of the opinion of my noble and learned friend on the woolsack, in which he expresses his approval of the decision of the Court of Exchequer in the case, "in *Re Micklethwait*." I think it quite clear that the Appellant was entitled to be allowed the value of the annuity of 1,200 l. per annum which he lost on his coming into possession of the estate for life on the death of the late Lord *Braybrooke*. The acquisition of the life estate was beneficial to him only to the extent of its value less the amount of the annuity. So far, therefore, at all events, the decree of the Court of Exchequer in this case must be varied.

But in my noble and learned friend's opinion upon the principal question in this case, I cannot, after all the consideration I have bestowed upon the subject, bring myself to agree.

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There is no doubt, that if the entail had not been cut off, and the estate had not been resettled, Lord *Howard de Walden* must have been considered as the predecessor, and the Appellant the successor; and the duty to be paid on the death of the late Lord *Braybrooke*, who died since the 16 & 17 *Vict.* c. 51, came into operation, would have been ten per cent., according to his relationship to the settlor, Lord *Howard de Walden*.

The question is, what alteration was caused by the subsequent settlements made by the disentailing deed of the 21st July 1841, and the deed of appointment of the 1st January 1850?

It was laid down by the Court of Exchequer, in the present case under appeal, in conformity with the previous decision in that of *The Attorney-General v. Sibthorp*, that family settlements made no difference with respect to the rate of duty. I conceive that this is an erroneous ground of decision, and cannot be sustained. Indeed, it was not insisted upon by the *Attorney-General* on behalf of the Crown, but the case was rested upon the true effect of the settlements of 1841 and 1850, and that is now to be considered.

I have felt considerable difficulty in forming my opinion on that question, and I doubt much whether the very able framers of this well-drawn Act of Parliament have distinctly provided for this particular case; upon the best consideration I can give this subject, I feel at least so much doubt upon it, that I think that the duty of 10 per cent. cannot be imposed upon the Appellant.

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There are three instruments under which the Appellant's interest arises.

The first is the will of Lord *Howard de Walden*, dated in 1796, under which the Appellant's father became tenant for life, with the remainder to the Appellant in tail.

The second, the disentailing deed executed by the Appellant and his father in 1841, by which the *Audley End* estates, subject to the life estate in the father, and to the estates prior to the estate tail limited to the Appellant, were, with the consent of the father, as protector of the settlement, granted to trustees, to such uses as the father and son should jointly appoint, remainder to such uses as the son, after the father's death, should appoint, and in default of appointment to the son for life, with remainder to his first and other sons in tail, with divers remainders over. Though the life estate of the Appellant's father was unaffected by this disentailing deed, the Appellant took a very different estate from what he had before. All the remainders over upon his estate tail were barred, that estate converted into a fee, and the father and son acquired by mutual agreement a new joint power of appointment by which the whole estate might be disposed of; each acquired from the other a moiety of that joint power which was newly created by that instrument, and never existed before. This gave them a power of disposing of the estate, the same as if they had been the owners.

The third deed is the settlement of 1st *January* 1850, by the Appellant and his late father, pursuant to that power. New considerations were reciprocally given as the price of the execution by that deed of the joint power acquired by the disentailing deed. The late lord gave up a charge of

10,000 *l.* and upwards, on the estate which he was entitled to. He charged a present annuity of 700 *l.*, and, in the event, which happened, of the Appellant's marriage, 1,200 *l.* a year, and he brought into settlement very large freehold estates, of his own. The son, on the other hand, gave up three nominations to the mastership of *Magdalen College, Cambridge*, two livings, and land, parcel of the *Audley End* estates; and agreed to confirm some leases, which he might possibly have set aside, and reduced his estate tail in the *Audley End* estates to a life estate.

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This seems to me to make a very great difference in the position of the parties. By the disentailing deed they obtained a joint power of appointment; by the exercise of that power, for mutual valuable considerations, they have acquired separate interests, entirely different from those they took under the will of Lord *Howard de Walden*. Under that will the son would have taken an estate tail in remainder, after his father's life estate, in lands incumbered with a charge in favour of his father for 10,000 *l.* and upwards. By the new mutual agreement he has got a life estate in land unincumbered with that charge, and consequently of greater value; he has obtained an annuity, payable before his father's death, of 1,200 *l.* a year, charged on those lands, and a life interest on other extensive estates. But he has purchased those advantages not merely by giving up his estate tail in the lands left by Lord *Howard*, but also his patronage of *Magdalen College* for two lives, two advowsons, and lands. Who can say what part of this life estate is derived from the bounty of Lord *Howard de Walden*?

In my opinion he has entirely a new interest, derived partly from his father, partly from himself. I cannot think that the Appellant can be considered as taking his succession under the will of Lord *Howard de Walden*,

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which has been superseded by the new arrangement made by the father and the son, founded upon new and valuable considerations. A part of the interest of the Appellant was taken out of that which was Lord *Howard de Walden's* estate, but Lord *Howard* was not the donor of it. And the question is, I think, not whether the interest of the Appellant was derived out of his estate, but whether it was derived from him as the settlor.

Upon this view of the case, I think the second section of the Act applies to it. I should say that in making those dispositions the father and son were the settlors, and therefore predecessors, and the son the successor in respect of his ultimately acquired interest in the succession, and the duty to be paid would correspond with that relation.

Do the other sections of the Act control that section, and what duty do they impose on this species of succession? This is the part of the case upon which it is impossible not to feel some doubt.

The twelfth section, on which the *Attorney-General* in his argument at the bar, and my noble and learned friend the *Lord Chancellor* in the opinion which he has given, rely, does not, I think, apply to this case. The section is as follows. [His Lordship read it; *see ante*].

It seems to me impossible to consider the disposition made by the deed of 1st *January* 1850, as a disposition made by the Appellant, whatever might have been said if there had been no other deed than the disentailing deed executed by himself and his father in 1841; for that deed left his father's life estate unaffected, and the son might be considered as so settling the remainder in tail, enlarged into a fee, by a disposition made by himself. But under the deed of the 1st *January* 1850, I think the disposition is not made by himself; it is made by himself and his father

jointly, by virtue of the newly created power, quite independently of the will of Lord *Howard de Walden*, which power they acquired by mutual agreement, in part founded upon valuable considerations wholly collateral to, and independent of, that will.

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I have satisfied myself that the disposition by which the Appellant acquired the estate, and for which he must pay the proper duty, is the new settlement by the deed of 1st *January* 1850, and not the will of Lord *Howard de Walden*. To test this, let us suppose that Lord *Braybrooke* and his son, the Appellant, had executed their joint power of appointment in favour of the widow or a son of Lord *Howard* (if he had such), would the former have paid no duty, the latter 1 *l.* per cent. ? I should think no one would maintain that less than 10 *l.* per cent. would have been payable in either case. Neither of them would have been indebted to the bounty of Lord *Howard* for the estate so acquired, but to that of Lord *Braybrooke* and his son. In that case, they would have been the settlors or disponers. The section which seems to me to approach the nearest to this particular case is the 13th ; but I am at a loss to distinguish the relative proportions of the interest derived from the father and the son respectively. The result is, that I do not see my way to any other conclusion than that the Appellant, as successor to his father, ought to pay 1 *l.* per cent. on the nominal value of the *Audley End* estates, deducting therefrom the annuity of 1,200 *l.* a year.

But I understand from my noble and learned friend, Lord *Kingsdown*, from his communications with me, that he thinks that the fifteenth section applies to this case, and that the Appellant must be considered as holding by alienation, or other derivative title, from the person originally entitled on the death of the late Lord *Braybrooke* ;

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and that he is therefore, by that section, chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would be chargeable if no such alienation had been made or derivative title created.

This view of the case has not been presented to your Lordships in the argument at your Lordships' bar, nor does it appear to have occurred in that in the Court of Exchequer; but, nevertheless, if well founded, it ought to prevail. But I think, on the best consideration I can give to the subject, the 15th section does not apply. It is meant to meet the simple case of a person, having a right to a succession within the meaning of the Act, totally alienating that right to another person before the succession opens; or carving out a derivative interest from it; in which case the section provides that the assignee, or the person having the derivative title, shall stand on the same footing as the assignor. But if there is something different from a mere transfer of the interest or a part of it, if there is a title conferring a *new succession* on any other person, then the 15th section does not apply, as appears by the context; for, after having previously provided for the case of expectant property being vested in another at the time of the passing of the Act, it provides for other cases *after* the passing of the Act, and enacts that it shall not extend to alienations conferring a *new succession*.

Now the great point which to my mind is fully established is, that the deed of 1st *January* 1850, constitutes an entirely new succession; it was a complete alteration of the old interests, and is really on the same footing for this purpose as if the father and son had bought and settled a new estate upon the same uses and trusts as are mentioned in that indenture. That arrange-

ment is the root of the title of the Appellant, and not a mere transfer or alteration. I think, therefore, that he is not liable to the ten per cent. duty.

There seems, as I have observed, no section of the Act precisely applicable to this case. The one that approaches the nearest to it is the 13th. Will the successor of the Appellant, who takes a part of Lord *Howard de Walden's* estate, but not *from* him, be liable to pay ten per cent. ?

From the argument at the bar, it appears that the Appellant is willing to pay 1 l. per cent. on a moiety as derived from his father. No proposition is better established than that a tax cannot be imposed on a subject unless by clear words, and I cannot certainly see my way to the conclusion that more than one per cent. on a life interest in a moiety can be recovered.

I have to add, that, at all events, so much of the value of the property as would be required to satisfy the charge of Lord *Braybrooke*,—10,000 l. given up,—ought not to be charged with duty at higher value than one per cent., for that part of the value was derived from his father.

Lord *Kingsdown* :

My Lords, it is not a very convenient course that what has passed in discussion between noble Lords in the consideration of a case, should be adverted to when judgment is delivered. The opinion which I have formed upon this case is entirely without regard to the 15th section, to which my noble and learned friend has referred. If it had been necessary to enter into the consideration of that question, I should probably have been of opinion, with my noble and learned friend on the woolsack, as to the inference to be drawn from that section. But the opinion which I now desire to state is formed without refer-

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ence to any considerations except those which I am about to lay before your Lordships.

By the Succession Duty Act of 1853, every person succeeding to any property on the death of another who dies after the Act comes into operation, is (with certain exceptions) subjected to the payment of duty upon the value of his succession.

One of the exceptions is, where a person succeeds under a disposition made by himself; but this exception is subject to the qualification that "if, at the date of such disposition, the person making it shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of the Act, and such person shall have died during the continuance of such disposition," he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with, if no such disposition had been made.

Now at no time, as it seems to me, was Lord *Braybrooke* entitled to any interest in the *Audley End* estates, except in expectancy upon the death of his father, who died after the Act came into operation. Under the will of Lord *Howard de Walden*, he was entitled to an estate tail in remainder after his father's life estate. Under the disentailing deed of 1841, his estate was also expectant on his father's death, and it was equally so under the deed of 1850.

Under the will of Lord *Howard de Walden*, he was liable to the payment of 10 per cent. duty, and if the subsequent deeds are to be considered as dispositions made by himself, he remains liable to the payment of that rate of duty.

By the disentailing deed of 1841, the remainder in tail male to which Lord *Braybrooke* was entitled, was con-

verted into a remainder in fee; and the estate was settled subject to the joint power of appointment in the father and son, to such uses as the son, if he should survive the father, should appoint; and in default of appointment to himself for life, with remainder to his first and other sons in tail male.

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Though in law a new estate may have been created by this deed, it seems to me impossible to hold that it is not a disposition of the previous estate vested in the son, and a disposition under which the son, if he survives his father, takes, if he thinks fit to exercise his power, an absolute estate, and if not, an estate for life.

It is, I think, a disposition made by the son, of an estate which he previously held, and liable to the payment of duty at 10 per cent.; and it does not seem to me sufficient to deprive it of that character, that his father, as protector of the settlement, consented to it.

If Lord *Braybrooke* had succeeded under this deed, I think he must have been subject to the same duty to which he would have been liable if no such deed had been executed, viz., 10 per cent. In fact, however, he succeeded not under the deed of 1841, but under the deed of 1850; and the estates thereby limited were created by the execution of a joint power of appointment by the father and son.

The question by which I have been embarrassed, and on which I confess that my opinion has much fluctuated, is this: Whether the deed of 1850 is not to be considered as the joint disposition of the father and son, and whether the father is not to be considered, under the 13th section, as one of the predecessors from whom the son derives his succession? If so, it would be necessary to consider whether the proportional interest derived from the father is distinguishable. If it be not, the father

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would be treated, as to one moiety, as the predecessor, and the son, as to that moiety, would be chargeable with only one per cent. duty. This was the point mainly urged by the Appellant's counsel in their very able argument at your Lordships' bar. But after much consideration, I have arrived at the conclusion that the proposition so advanced cannot be maintained.

In the first place, as regards the form of the conveyance by the execution of a joint power, the general rule of law is, that limitations created by the execution of a power must be read as if they were introduced into the deed creating the power, and I have already expressed my opinion that the deed creating the power must be considered as the act and disposition of the son.

But to deal with the case, as it is always more satisfactory to do, on the substance and real effect of the transaction, does the son take any estate or interest whatever, in the property which is now the subject of dispute, from the disposition of the father? To a certain extent he does; his life interest is increased in value by his father's surrender of the charge on the reversion of 10,000 *l.*, and to that extent, I think, he is liable to only one per cent. duty. As to the rest, *with respect to the reversion of the Audley End estate*, he takes no interest whatever from the father. He gives up a great deal, but he takes nothing. A portion of the estate he conveys away; he gives up the power which he had of disputing instruments affecting the estate executed by the father; he gives up the absolute power over the property which he had if he survived the father; he becomes tenant for life only of the estate. For all these sacrifices he, no doubt, receives abundant compensation from the father, who brings into settlement estates much larger than that of *Audley End*. And to the extent of anything which

he succeeds to through his father's disposition, he is charged only with one per cent. As to that portion of the reversion which he sold, of course he pays nothing, and as to that which he retained, he will be charged on the value of a life interest only. The amount of duty will, of course, be reduced, but the rate of duty must, I think, be the same as if the deeds of 1841 and 1850 had never been executed. This seems to me to be the result, whether we regard the language of the Act, the technical rules of law, or the substantial truth and justice of the case.

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GENERAL.

But, on the other hand, I think that a person taking a succession under the Act is to pay a duty only upon its value, and that the value is to be computed by taking into account, not only what he gains, but what he loses by the succession. Here Lord *Braybrooke* loses his annuity, in respect of which I agree with the *Lord Chancellor*, in thinking that he is entitled to an allowance. In this respect, and also with regard to the 10,000 *l.* charge, I think the decree below must be altered.

The *Lord Chancellor*. The judgment of the Court below will be varied. It is only upon what the Appellant takes under the will of Lord *Howard de Walden* that the ten per cent. is to be charged. It cannot be charged upon the 10,000 *l.*, and he is to have an allowance for the annuity.

Ordered, that the decree below be varied, so far as relates to the annuity of 1,200 *l.*, and the sum of 10,134 *l.* 5 *s.* 8 *d.*, the House being of opinion that the Appellant is chargeable with duty on the *Audley End Estates*, at the rate of 10 *l.* per cent., but that he is entitled to an allowance in respect of each of the sums above mentioned.

Lords' Journals, 19 March 1861.

1861.

April 18.

*Quo
Warranto.
Charge of
Venue.*
3 & 4 W. 4,
c. 42.
6 & 7 Vict.
c. 89.

JOHN CLERK - - *Plaintiff in Error.*The QUEEN - - *Defendant in Error.*

In an information in the nature of *quo warranto*, there was, after issue joined, a suggestion entered on the record "that the trial of the issue may be more conveniently had" in *M.* than in *L.* The Defendant appeared at the trial in *M.*:

HELD, that for the purpose of securing a fair trial, the Court has an inherent power to change the venue; that if this form of suggestion was insufficient, it should have been demurred to; that the Defendant had here waived all objection to it by appearing at the trial, and that it was no ground of error.

AN information in the nature of *quo warranto* had been filed against *John Clerk*, calling on him to show by what authority he claimed to act as a town councillor of the borough of *Liverpool*. The venue in the margin of the information was "*Liverpool*." After plea and replication, a suggestion was (2d March 1859) entered on the record, "that it manifestly appears to the Court here that the trial of the said issue may be more conveniently had in the county of *Middlesex* than in the county of *Lancaster*. Therefore, &c." The *postea* showed that the case was tried before "a jury of the county of *Middlesex*." The verdict was for the Crown, and judgment was given thereon in the usual form. Proceedings in error were taken, the error assigned being that the issue joined "was tried in and by a jury of the county of *Middlesex*, and not in and by a jury of the county or place where the venue in the said information is laid; that there is no statute or law to warrant a trial of the said issue by a jury of the county of *Middlesex* upon a suggestion that the trial thereof might be more conveniently had in that county than in the county of *Lancaster*." There was joinder in error, and the Court of Exchequer Chamber (14 June 1860) affirmed the judgment. The case was

then brought up to this House on the question of the sufficiency of the order for the change of venue.

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v.
The QUEEN.

Mr. *Brett* appeared for the Plaintiff in error.

The Lord Chancellor (Lord *Campbell*). Can you hope successfully to contend that the Court has not power to direct a change of venue when it thinks that the case cannot be satisfactorily tried without it? The suggestion was, that the trial could not properly be had in the county of *Lancaster*.

Mr. *Brett*. The objection is, that it was only stated, that "it might be more conveniently had in the county of *Middlesex*." The statute of *quo warranto*, 18 *Ed.* 1, c. 2, s. 2, expressly directs, that for saving of the costs of the subjects, all trials in *quo warranto* shall be had before the Justices on their circuits. There is not enough shown on the record here to warrant the departure from this statutory rule. The change of venue was made by an order of Mr. Justice *Williams* at Chambers upon an ordinary application and suggestion, as if this had been an action, and was within the provisions of the 3 & 4 *Will.* 4, c. 42, s. 22, that it would be "more conveniently" tried in *Middlesex*. No such change can properly be made unless it is distinctly suggested and shown to the satisfaction of the Court that justice cannot be had by a trial at the place of the original venue. The 6 & 7 *Vict.* c. 89, s. 5, which gives to the Court the power to fix originally the venue in *London* or *Middlesex*, gives it no power upon a mere suggestion of convenience to change the venue to *Middlesex* from another county.

The Lord Chancellor. Assuming the law to be as stated, I should, as a Judge of appeal, looking at this entry on the record, consider that it was suggested that the

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trial could not fairly be had in the county of *Lancaster*. In such a case there is an inherent power in the Court to change the venue. If the suggestion was not made in the proper form, it ought to have been demurred to. There is no ground of error here.

Lord *Cranworth*. I agree. *In hoc statu* there is no error.

Lord *Chelmsford*. Before the House can set aside a verdict and judgment on such a ground, it must be satisfied that the trial was altogether void. It cannot be asserted to have been so here. Assuming that the order might have been set aside as irregular, had the objection of irregularity been taken in time, yet, as the Defendant appeared at the trial without making objection, and allowed the trial to proceed, he must be taken to have treated the proceeding as regular.

Mr. *Milward*, for the Defendant in Error, applied that the judgment should be affirmed, with costs.

The *Lord Chancellor*. Yes, that must be so.

Judgment affirmed, with costs.

Lords' Journals, 18 *April* 1861.

1861.

April 11.

*Nullity of
Marriage.
Delay.*

FANNY CASTLEDEN - - - - *Appellant.*

GEORGE CASTLEDEN - - - - *Respondent.*

Delay in instituting a suit for nullity of marriage on the ground of impotence is not an absolute bar to the suit, but renders it necessary that the evidence to support the suit should be of the clearest and most satisfactory kind :

Where, therefore, a woman who had married in 1834, lived with her husband till 1838, then separated from him, in 1853 caused him to be sued for her debts, obtained from him an allowance, which was continued till *October* 1858, and in *November* 1858 instituted a suit for nullity of marriage on the ground of incompetence, it

was held, that she was bound to give unequivocal proof of the truth of the allegation in the petition, and the Lords not being satisfied that the evidence was of that character, the decree of the Court below, dismissing the petition, was confirmed.

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THIS was an appeal against a decision of the Court Matrimonial in a suit instituted by the Appellant for nullity of marriage on account of alleged incompetency on the part of the husband.

The petition, filed 23d *November* 1858, set forth, that on the 16th *December* 1834, the Petitioner, then a spinster, of the age of eighteen years, was married to the Respondent, then a bachelor of the age of thirty, at the parish of *Woburn*, in the county of *Bedford*; that he was at that time incompetent, and, therefore, she prayed that the marriage might be declared null. The Respondent, though duly cited, did not appear. Evidence, which it is not necessary to repeat, was taken on the subject of the husband's alleged incompetency. It showed that there was none on her part. In the course of this evidence, it appeared that the Petitioner lived with the Respondent till 1838, when she went to her father's house. She afterwards, for many years, maintained herself by teaching. During this period she was attacked by an illness, which rendered a surgical operation necessary, and the surgeon who performed it, deposed, "I found so much difficulty in making the examination, that I was induced to ask the Petitioner whether it was possible that the marriage had been consummated, and I believe she replied, that, to the best of her knowledge, it had not been. I recollect that the condition of the parts was such as to warrant the inference that it had not been consummated. There was no imperfection on her part to render consummation impossible." For some years she was anxious again to live with her husband: she expressed

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a desire to that effect down to 1854. In 1854, being ill, and the Respondent not granting her any assistance, proceedings were taken against him, in the character of her husband, to compel payment of debts she had incurred. He then made an allowance of 20 *l.* a quarter, which was continued till *October* 1858, at which time he wrote to say it must be reduced to 45 *l.* a year. In *November* 1858 this suit was commenced. The learned *Judge Ordinary* and Mr. Justice *Williams* were of opinion (Mr. Baron *Bramwell* dissenting), that the proof of incompetency was not so complete and perfect as it ought to have been, considering the number of years that had been allowed to elapse between the marriage and the institution of this suit, and the petition for nullity was dismissed (*a*). This appeal was then brought.

Mr. *Roundell Palmer* and Dr. *Spinks* for the Appellant:

It is sufficient, if reasonable evidence of such a matter is given, more especially where the husband, though duly cited, does not appear. There is here evidence of expressions on the part of the husband which amount to a confession of incompetency. Delay on the part of the wife, who is the injured party, is of small consequence as against her, though delay on the part of the party in whom the defect existed would be fatal, *Norton v. Seton* (*b*), in which many cases are collected. Sir *J. Nicholl* there said, "Here the maxim applies *cur tamdiu tacuit*. The lapse of time may act as an absolute bar to a suit not brought by the party injured." That principle, looked on in the *United States* as a settled principle of the law of *England*, and is there adopted as such,

(*a*) 29 Law Journ. Div. & (b) 3 Phillim. 147.
 Matr. Cas. 81.

Bishop's Law of Marriage (c). Where, in a suit of this kind brought 12 years after marriage, a certificate was given that the petitioner was *virgo intacta* and *apta viro*, and the man's confessions in conversation with two medical men were proved (though he afterwards withdrew to *France*, had not given in his answer, and refused to undergo any medical examination), the case was held to be substantiated and the Court pronounced for nullity, *Pollard v. Wybourn* (d). The evidence was quite as strong here. *Oughton* (e), and *Sanchez* (f), show that what has been done here entitles the petitioner to a decree. There cannot be a doubt on this evidence that there has not been consummation, and if so, that is itself evidence of incompetency, *Sparrow v. Harrison* (g), where there was a decree for nullity without inspection.

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[Lord *Chelmsford* referred to Lord *Stowell's* opinion in *Guest v. Guest* (h), and in *Brooks v. Morgan* (i), where he said, "There is the delay of 16 months, which is not easily accounted for," and to the judgment of the Privy Council, as delivered by Dr. *Lushington* in *Berrington v. Berrington* (j), all of them showing that a delay in bringing the suit, unless most satisfactorily explained, was an answer to it.]

There can be no presumption here against the petitioner from delay; she expressly accounts for her delay by dislike to exposure, and by incapability to incur expense. On the latter point there is no doubt of the truthfulness of the explanation. There is here no question raised as to the sincerity of the proceeding—collusion is not even pretended—and the husband, by his own conduct, prevents

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|--|-------------------------------------|
| (c) 3 Edit. p. 410. | (g) 3 Curt. 16. |
| (d) 1 Hagg. Ec. Cas. 725. | (h) 2 Hagg. Cons. Rep. 321. |
| (e) Ordo Judiciorum, vol. i, tit. 217. | (i) 2 Hagg. Cons. Rep. 330. |
| (f) Lib. 7, Disp. 108. | (j) 1 Spinks, Ecc. & Adm. Rep. 248. |

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the Court from obtaining the specific evidence which would render all doubt upon the matter impossible.

No one appeared for the Respondent.

The Lord Chancellor (Lord *Campbell*):

My Lords, I must say that I should have thought it very much to be lamented if we had felt it our duty in this case to reverse the decree. I think it would not be creditable to the jurisprudence of *England*. Here is the case of a woman who lives and cohabits four years with her husband, and then she parts with him, and is fully aware, according to her own statement, that he is unable to consummate the marriage. She remains for nearly sixteen years wishing to return to him and live with him as his wife, and during that time she allows him to be sued for her debts, and then, in the year 1858, twenty-four years after the period of the marriage, she commences her suit.

If lapse of time is not a bar (I do not say that it is an absolute bar), at all events we must require after such a lapse of time the clearest, strictest, and most unequivocal evidence of the facts necessary to support a petition that is presented for a declaration of nullity of marriage. I think there is not anything like strict and judicial proof of non-consummation, or of her being intact, or of his impotence. I think that not one of those three things is proved at all in a satisfactory manner. There may be suspicion or probability of non-consummation, but there is no strict proof of it. There is not proof that she was *virgo intacta, apta viro*. Nor is there proof that he was impotent either from rigidity, or malformation, or any other cause.

At all events, lapse of time is most important with re-

gard to the evidence which shall be required. It is said that stricter evidence than that which has been produced cannot now be given, but stricter evidence might have been given if she had brought forward this suit in the year 1838, or at some subsequent period, much before the time when it was actually brought. But she makes no such attempt, and it seems to me that she does not now sue on account of what is supposed to be the general motive for a woman bringing such a suit, but she brings it merely because he has ceased to support her. That is the reason, and the only reason, why the suit is instituted. And according to the cases that have been referred to, lapse of time, coupled with that indirect motive, is considered of itself an absolute bar.

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I have carefully read the judgments in the court below, and think that the reasons given by the *Judge Ordinary* and Mr. Justice *Williams* greatly outweigh the observations made by Mr. Baron *Bramwell*, and that the Court did well to dismiss the petition: I must therefore advise your Lordships that this appeal should be dismissed. This being a case *ex parte*, nothing is to be said about costs.

Lord *Chelmsford*, referring to what he had said in the course of the argument, concurred with the *Lord Chancellor*.

Lord *Kingsdown* was of the same opinion.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals, 11 April 1861

1861.

April 18.

Practice.
Dismissal of
Appeal.

MARIA SMITH, and another - - *Appellants.*

GEORGE DURANT, and others - - *Respondents.*

Where an Appellant does not appear to support his appeal, it may, on the application of the Respondent, be dismissed, with cost -

ON this case being called on—

Mr. *Roundell Palmer* stated, that he appeared for some of the numerous Respondents, others being represented by Mr. *Selwyn*. The Appellants had not lodged their case. An application had, therefore, been made by the Respondents to the Appeal Committee, and the Respondents had been allowed the option whether they would have the case heard *ex parte*, or would allow the appeal to be merely dismissed for non-prosecution. In order to prevent any future proceeding, the Respondents elected to have it heard *ex parte*, and if their Lordships desired it, he was ready to state the nature of the case (*a*). And at all events he was by the practice entitled to ask their Lordships to dismiss the appeal, with costs, *Martin v. D'Arcy* (*b*).

The Lords directed the Appellants to be formally called at the bar.

This was done; no one appeared to answer.

The Lord Chancellor (Lord *Campbell*). If the appeal was simply dismissed for non-prosecution, the Appellant might apply to bring it forward again; but if the Respondents appear, and ask for judgment, that cannot be done.

Mr. *Palmer*. That is the course which the Respondents now adopt; it is the duty of the Appellant to show error in the court below.

The Lord Chancellor. The precedents seem to be quite conclusive. There was a similar case in 1848 (*c*).

Appeal dismissed, with costs.

Lords Journals, 18 April 1861.

(*a*) See *Jones v. Cannock*, 3 H. L. Cas. 700. (*b*) *Id.* 698.

(*c*) *Wood v. Young*, Lords Journals, 26 June 1848.

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Feb. 25, 26,
28.

March 1, 18.

JAMES W. BROOK and others - - Appellants.
CHARLES BROOK and others and the } Respondents.
ATTORNEY-GENERAL - - - }

Marriage.
Conflict of
Laws.

Personal
Disability.
Prohibited
Degrees.

Statutes

28 H. 8, c. 7,
and c. 16.

32 H. 8, c. 38.
5 & 6 W. 4,
c. 54.

The forms of entering into the contract of marriage are regulated by the *lex loci contractus*, the essentials of the contract depend upon the *lex domicilii*. If the latter are contrary to the law of the domicile, the marriage (though duly solemnized elsewhere) is there void. The Marriage Act, 26 Geo. 2, c. 33, only applies to the forms of certain marriages celebrated in this country; it does not touch the essentials of the contract. It is, therefore, only territorial.

The 5 & 6 Will. 4, c. 54, affects all domiciled English subjects wherever they may be transiently resident. It does not affect them when actually domiciled in British Colonies acquired by conquest, where a different law exists.

The marriage of a man with the sister of his deceased wife is declared by the 28 Hen. 8, c. 7, to be contrary to God's law; and though that statute itself is repealed, its declarations are renewed in the 28 Hen. 8, c. 16, and 32 Hen. 8, c. 38, which are in force.

Being forbidden by our law, such a marriage contracted by British subjects, temporarily resident abroad, but really domiciled in this country, though valid in the foreign country, and duly celebrated according to the forms required by the law of that country, is absolutely void here.

A. and B., British subjects, intermarried; B. died; A. and C. (the lawful sister of B.), being both at the time lawfully domiciled British subjects, went abroad to *Denmark*, where, by the law, the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of *Denmark*, married:

HELD, that under the provisions of the 5 & 6 Will. 4, c. 54, the marriage in *Denmark* was void.

WILLIAM LEIGH BROOK, of *Meltham Hall*, in the county of *York*, married in *May* 1840, at the parish church of *Huddersfield*, in *Yorkshire*, *Charlotte Armitage*. There were two children of that marriage, *Clara Jane Brook* and *James William Brook*. In *October* 1847, Mrs.

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 }
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Brook died. On the 7th *June* 1850, *William Leigh Brook* was duly, according to the laws of *Denmark*, married at the *Lutheran* church at *Wandsbeck*, near *Altona*, in *Denmark*, to *Emily Armitage*, the lawful sister of his deceased wife. At the time of this *Danish* marriage, Mr. *Brook* and Miss *Emily Armitage* were lawfully domiciled in *England*, and had merely gone over to *Denmark* on a temporary visit. There were three children of this union, *Charles Armitage Brook*, *Charlotte Amelia Brook*, and *Sarah Helen Brook*. On the 17th *September* 1855, Mrs. *Emily*, the second wife of Mr. *Brook*, died at *Frankfort* of cholera, and two days afterwards Mr. *Brook* himself died of the same complaint at *Cologne*, leaving all the five children him surviving.

Mr. *Brook*, in the early part of the day on which he died, executed a will, by which he disposed of his property among his five children, and appointed his brother *Charles Brook*, and his two brothers-in-law, *John* and *Edward Armitage*, his executors and trustees. In consequence of the state of his property and of some pending purchases of land, and afterwards on account of the death of the infant *Charles Armitage Brook*, it became necessary to institute an administration suit, and a bill was filed for this purpose in *March* 1856, which by order of the Court, was amended, and in *July* 1856, a supplemental bill was filed, making the *Attorney General* a party to the suit.

The causes came on to be heard in *March* 1857, before Vice Chancellor *Stuart*, when certain inquiries were ordered, and in *June* 1857, the chief clerk certified (among others) the facts above stated, and the certificate raised the question of the validity of the marriage at *Wandsbeck*. Evidence was taken on this subject, and several declara-

tions were made by officials and by advocates in *Holstein*, that the marriage of a widower with the sister of his deceased wife was perfectly lawful and valid in *Denmark* to all intents and purposes whatever.

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v.
BROOK.

The cause coming on for hearing, on farther directions, Vice-Chancellor *Stuart* called in the assistance of Mr. Justice *Creswell*, who, on the 4th *December* 1857, declared his opinion that the marriage at *Wandsbeck*, was by the law of England invalid. Vice-Chancellor *Stuart* on the 17th *April* 1858, pronounced judgment, fully adopting this opinion, and decreed accordingly. This appeal was then brought.

Sir *F. Kelly* and Mr. *Malins* (Mr. *G. Lake Russell*, Mr. *Cleasby*, and Mr. *Freeman* with them) for the Appellants:

It is a settled rule of international law, that every contract must depend for its validity on the law of the country in which it is made. Marriage is a contract which falls within this rule. Being valid where it is made, its validity must be accepted throughout the world. There are two exceptions to this general principle: First, where the contract is *malum in se*. Secondly where, though valid in the country where made, it is by express law prohibited in another country, and all the subjects of this latter country are forbidden any where and under any circumstances to enter into such a contract (*a*). The question here will depend on this second exception.

The *English* law has acknowledged marriages which would have been invalid in this country, to be valid if duly celebrated elsewhere. Marriages by words of present acknowledgment only are instances of this, *Compton*

(*a*) Story, *Conf. of L.*, ss. 82, 113, 114, 117, 123.

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v. *Bearcroft*, (b) so as even to entitle the wife to dower here. *Ilderton v. Ilderton* (c), *Ruding v. Smith* (d), *Scrimshire v. Scrimshire* (e), in which last case the rule was distinctly declared, though the alleged marriage there was held to be void as being contrary to the law of the foreign country, as well as of the domicile. *Gayll* (f), is there quoted (g), for the principle that “*constat unumquemque subjici jurisdictioni judicis, in eo loco in quo contraxit*,” and that principle was acted on in *Harford v. Morris* (h), *Butler v. Freeman* (i), and *Roach v. Garvan* (j), and the converse of it, namely, that the marriages of all subjects celebrated abroad not in accordance with the *lex loci* are invalid, was asserted in *Middleton v. Janverin* (k).

Personal laws have no extra territorial application. *Paul Voet*, and other authorities, all of which are summed up by *Story* (l). A contract valid where made, and capable of being performed anywhere, may be enforced in a country where it could not be legally made, as in the case of the usury laws, *Harvey v. Archbold* (m), *Mill v. Roberts* (n). It is admitted that this principle is not recognised as to marriage by the law of *France*, but then the law of *France* on that matter is an exception to all laws. The *Sussex Peerage* case (o), is not an exception to this rule, for it was held there that the words of the statute expressly attached on the persons of a particular family, and the Duke of *Sussex* was one of that family. But for that peculiarity, if the marriage had been proved

(b) Buller's N. P. 113, 114.
 See 2 Hagg. Cons. Rep. 444 n.
 (c) 2 H. Bl. 145.
 (d) 2 Hagg. Cons. Rep. 371.
 (e) Id. 395.
 (f) Lib. 2, Obs. 36.
 (g) 2 Hagg. Cons. Rep. 408.
 (h) Id. 423.

(i) Ambl. 303.
 (j) 1 Ves. 157.
 (k) 2 Hagg. Cons. Rep. 437.
 (l) Conf. of Laws, s. 7, 20-22.
 (m) 3 Barn. & Cres. 626.
 (n) 3 Esp. 163.
 (o) 11 Clark & Fin. 85.

to be valid by the law of *Rome*, where it was celebrated, it would have been valid here ; and so it was held in *Sarft v. Kelly* (*p*), where no such personal disability existed. The case of *Birtwhistle v. Vardill* (*q*), and the recent case of *Fenton v. Livingstone* (*r*), may both be put aside, as they relate rather to the tenure of property than to the law of marriage. In the former, especially, the marriage was undoubtedly valid, and the only question was as to its retroactive effect upon landed property in *England*. If this marriage should be pronounced invalid here, though validly celebrated in *Denmark*, it must be on the ground that such marriages are invalid as contrary to the law of God, but that is not expressly asserted by any statute in this country, the only statute which did declare it, 28 *Hen.* 8, c. 7, having been repealed.

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In *Sherwood v. Ray* (*s*) it was considered that such a marriage, though by the canon of 1603 declared to be prohibited by the law of God, was not to be so treated by the principles of the law of *England*. And in *Westby v. Westby* (*t*) Lord Chancellor *Sugden* sustained a family arrangement, the very object of which had been to compromise family differences by not disturbing a marriage of this sort, which he would not have done had such a marriage been contrary to God's law.

If it is held here to be contrary to God's law, that would make a marriage between two *Danish* subjects invalid here when they came to reside in this country, though it had been perfectly valid in their own country. No such monstrous consequence can be permitted. It cannot be asserted here that such marriages are contrary to

(*p*) 3 Knapp P. C. Cas. 257. 497.

(*q*) 2 Clark & Fin. 671 ; 7 Id. 895. (*s*) 1 Curt. 173 ; 1 Moo. P.C.C. 355.

(*r*) 3 McQueen Sc. Ap. Rep. (*t*) 2 Dru. & War. 502.

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the law of God, for those which took place before this last Act are by that very Act declared valid, and it cannot be supposed that the Legislature would thus have recognised that which it intended to declare to be contrary to God's law. They can only be treated, supposing them to be within the provision of the 5 & 6 *Will.* 4, c. 54, as contrary to the law established by the special provisions of that statute. [Lord *St. Leonards*: Assuming that to be so, what then?] Then the statute cannot affect marriages made abroad and valid where made, for a statute can have no such extra-territorial application. That principle has been acted on in many cases in our own Courts, and more frequently still in the States of *North America*, where the variety of laws is great, and the occasions of conflict between them frequent. In *Greenwood v. Curtis* (*u*), a balance of account was in *Massachusetts* allowed to be recovered, though the account consisted almost entirely of the value of negro slaves; the contract itself being made in a State where such a contract was legal, though wholly illegal in the State of *Massachusetts*. In the same manner, in *Medway v. Needham* (*v*), a marriage between a mulatto and a white woman made in *Rhode Island*, where it was lawful, was in *Massachusetts* treated as valid, though it was not lawful there; and the broad proposition laid down was, that a marriage valid in the country where it is entered into is valid in any other country, and that too even though it should appear that the parties went into the country of the contract with a view to evade the laws of their own country. So in *Sutton v. Warren* (*w*), it was held that a marriage valid where it is contracted was valid in the State of *Massachusetts*, though not valid by the laws of

(*u*) 6 Mass Rep. 358.

(*w*) 10 Metc. Mass. Rep. 451.

(*v*) 16 Mass. Rep. 157.

that State, if it was not incestuous by the laws of nature. In *Wightman v. Wightman* (*x*), an American court considered whether, there being no statute regulating marriages within the prohibited degrees, or defining what those degrees were, the Court would declare marriages void between persons in the other degrees of collateral sanguinity or affinity.

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In *Simonin v. Mallac*, Sir Cresswell Cresswell (*y*) acted on a principle the opposite of which he adopted in the present case. A marriage between two *French* subjects had been celebrated in this country, in a manner valid here; it was invalid by the law of *France*, and had been so declared by a competent Court in that country; yet even after that decision, the learned Judge dismissed a suit for nullity instituted here. If that was a correct decision, because the marriage was good in the country where it was celebrated, it ought to govern the present.

The operation of the statute 5 & 6 *Will.* 4, c. 54, cannot be extended to other countries. It is a settled principle of law that where a statute purports to operate on contracts or any other acts, so as to avoid them, it must, by express terms, have its operation extended to the colonies and to foreign countries, or that operation will be limited to the United Kingdom. There are no such express terms in this statute; and, on the contrary, one part of the United Kingdom itself, namely, Scotland, is distinctly excepted from its operation. There is, indeed, the expression "All marriages," but that cannot mean all marriages in the world; then does it mean all marriages of British subjects? In order to have that meaning, the expression should have been used—it cannot be implied,—and certainly not implied to the extent

(*x*) 4 *Johnst. Cas. in Ch.* 343. (*y*) 29 *Law Jour. Prob. Cas.* 97.

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of affecting all British subjects all over the world. It is clear that it cannot apply to the colonies without their being directly named.

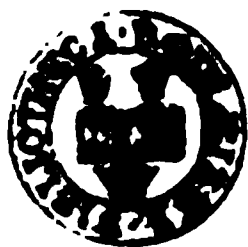
[Lord *St. Leonards*. May not the law affect the colonies without their being named, if it is fitted to them?]

No; *Clark* on Colonial Law (z). Nor can it affect British subjects in foreign countries; *Santos v. Illidge* (a), where the selling, by British subjects, of slaves in *Brazil* was held in the Exchequer Chamber to be legal, even though the purchasing of them there might be a felony in a British subject; and there Mr. Baron *Bramwell* expressly went on the principle that legislation must be confined to the country of the legislator, a principle which had been previously declared in the most express terms in the opinion declared to this House by Lord Chief Baron *Pollock* in the case of *Jefferys v. Boosey* (b). And, in point of fact, it would be impossible to apply this law to the colonies, for in them we have millions of Roman Catholic fellow subjects, who think such marriages perfectly good. Even in the conquered colonies all the law of the conquering state does not, as of course, prevail. Such a marriage would therefore be good in some of our own conquered colonies, for the French, Spanish, or Dutch laws, which permitted it, still prevail there. The prohibition of it which existed in the English law, is an exception to the law of the rest of Europe, unless it may be that of the little *Pays de Vaud* in *Switzerland*. It cannot be contended that, without naming our colonies or *British* subjects in foreign countries, the legislature meant that such a marriage between individual *British* subjects, wherever contracted, should be invalid. Without such

(z) p. 23 *et seq.*

(b) 4 H. L. Cas. 938.

(a) 29 Law Jour. C. P. 348.



expression it can have no such effect, *Clark* on Colonial Law (c). If it had been intended to apply to them, nothing was easier than to say so; the absence of any such declaration is conclusive to show that no such intention was entertained.

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The Act is nothing more than a Local Act, with a local exception. It forbids these marriages in future in *England*, but it excepts those which had already been contracted, and it is to have no operation in *Scotland*. If any such marriage between *English* persons had, before the passing of this Act, taken place in *Scotland*, where it is not valid, this Act would, therefore, have had the effect of rendering such marriage valid here, for it makes valid all such marriages had previously to the passing of the Act. The only object of the Act was declared by Lord Chancellor *Lyndhurst*, on the *Sussex* Peerage case (d), to be to declare that void which was before only voidable, and so get rid of a doubt capable of affecting most prejudicially parties interested in the question. Without, therefore, disputing the decision in *The Queen v. Chadwick* (e), it is contended that that decision cannot affect marriages which have taken place abroad. Dr. *Radcliff*, in the Ecclesiastical Court, in *Dublin*, held that an Irish statute similar to this, the 9 *Geo.* 2, c. 11, did not follow Irish persons so as to invalidate a minor's marriage duly contracted in *Scotland*, according to *Scotch* forms (f).

The Attorney-General (Sir *R. Bethell*), and Mr. *Wickens*, for the Crown :

This is purely a question of *English* law, and arises in determining the right of succession to real and personal

(c) p. 16 and n.

(d) 11 *Clark & Fin.* 137.

(e) 11 *Q. B. Rep.* 173.

(f) *Steele v. Braddell*, *Milw. Ecc. (Ir.) Rep.* 1.

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estate, the form and validity of the contract of marriage deciding the title by heirship. *Birtwhistle v. Vardill* (g) is, therefore, expressly applicable to this case. There are here five propositions. First, the *lex loci* determines the form of the contract. Secondly, the capacity of the parties to contract is determined by the *lex loci* of their domicile. Thirdly, that even supposing the contract to have been duly solemnised according to the law of the forum of its constitution, and even supposing the parties to have the capacity to contract, yet, if there is anything in the contract which is prohibited by *English* law, or is at variance with the institutions and policy of the *English* law, the contract cannot be accepted as valid in an *English* court of justice. These are the general principles that must be applied to the decision of this case. The particular principles to be added are these. Fourth, that by the Common and Statute Law of *England* all subjects, if within the prohibited degrees of affinity, are incapable of marriage, and a contract of marriage in disregard of that law is void. Fifthly, there is a marked distinction between the present case and that of a *Scotch* marriage, which is admitted in the *English* courts as valid, because the parties to such a marriage are capable of marrying, and there is no incapacity created or declared by the *English* Marriage Act, 26 *Geo.* 2, c. 33, which does not prevent the marriage of minors, but only relates to the observance of certain forms in their marriages: forms that of course cannot be required out of *England*.

There is nothing in the comity of nations, or the *jus gentium*, which affects the case, *Warrender v. Warrender* (h). That case shows, that the law of the domicile

(g) 7 Clark & Fin. 895.

Clark & Fin. 529, 531.

(h) Per Lord Brougham, 2

governs the marriage; for there, though the marriage, as to the solemnisation, was *English* the domicile was *Scotch*, and the marriage was treated as a *Scotch* marriage. The law of all countries merely adopts the *lex loci contractus* with relation to the solemnities of the marriage, not the capacity of the parties. The statute 5 & 6 Will. 4, c. 54, is of universal application to *English* subjects as its expressions are universal in their form. The words are, "all marriages," not "all marriages solemnised in *England*." *Scotland* is expressly exempted from its operation, because the same law already existed there. The sort of marriage thus forbidden by statute is, in *Harris v. Hicks* (i), described as incestuous, so that there does exist a legal declaration as to the nature of such a marriage, even if the 28 Hen. 8, c. 7, should be held to have no authority. But though that statute was repealed, its declarations of the forbidden degrees are, in fact, incorporated into the 32 Hen. 8, c. 38, which expressly adopts the *Levitical* degrees.

The parties cannot be allowed to evade the law of their domicile by fraudulently going into another country to do that which the law of their own country has forbidden. *Huberus* (j) puts the very case, and says, "*Brabantus uxore ductâ, dispensatione Pontificis, in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filiâ se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur;*" and he looks on these personal incapacities as tied round the necks of the subjects. As to this question of personal capacity *Story* (k) does not controvert the doctrine, which he

(i) 2 Salk, 547.

s. 8.

(j) De Confl. Leg. bk. I. tit. 3,

(k) Confl. of Laws, s. 50, *et seq.*

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admits to be laid down in the same manner by *Froland*, *Voet*, *Pothier*, and other writers.

It has been assumed throughout this argument that this marriage would be valid in *Denmark*. It may be doubtful whether that is so; but, at all events, it is not certain that, though the law of *Denmark* holds such a marriage among its own subjects to be valid, it would not hold it to be invalid as contracted between persons who were the subjects of a country where it was forbidden, and who merely came to *Denmark* to evade their own law.

Marriages within the prohibited degrees were, *Hill v. Good(l)*, void by the common law of *England*, which was founded upon God's law; but when the ecclesiastical courts attempted to enforce that law to the extent of declaring, after the death of the parents, the children to be illegitimate, the common law interfered to prevent that consequence, and hence grew up the distinction between marriages void and voidable. The latter word is not quite accurate. It should have been said, that the marriage was void, but that the law would not allow it to be so treated after the death of one of the parties. The ecclesiastical jurisdiction, however, continued with regard to the punishment of the survivor, as *Harris v. Hicks(m)* expressly declares. In such marriages, the persons are *inhabiles*. If so, the law of the place of celebration cannot make them *habiles*, for that law affects only the validity of the forms of celebration; and a marriage may be good in the place of celebration and yet be bad in the place of domicile, and that was the case in *Simonin v. Mallac(n)*, which, therefore, is not inconsistent with the present. Where the marriage is between two

(l) Vaugh. Rep. 302.

(m) 2 Salk, 547.

(n) 29 Law Jour. Prob. & M.

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persons who are not domiciled abroad, they cannot set up the *lex loci contractus*, except for the forms of celebration, for going abroad *animus redeundi*, they carry the *English* law with them. In *Fenton v. Livingstone* (o) this House left it to the *Scotch* courts to declare whether the marriage there contracted was incestuous by the law of *Scotland*.

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It is impossible to use language stronger than that which is employed in this statute. It leaves the law, as to capacity, just as before, but it declares that to be absolutely void which had been before voidable only during the life of both the parties.

The decision in *Steele v. Braddell* (p) does not affect the present, for there the case failed because proceedings had not been instituted in the time limited by the statute.

Sir *F. Kelly*, in reply, referred to *Swift v. Kelly* (q) as a case in which a marriage had been sustained solely because it was good by the law of the place where it was celebrated.

The Lord Chancellor (Lord *Campbell*) :

My Lords, the question which your Lordships are called upon to consider upon the present appeal is, whether the marriage celebrated on the 9th *June* 1850 in the duchy of *Holstein*, in the kingdom of *Denmark*, between *William Leigh Brook*, a widower, and *Emily Armitage*, the sister of his deceased wife, they being *British* subjects then domiciled in *England*, and contemplating *England* as their place of matrimonial residence, is to be considered valid in *England*, marriage between a widower and the sister of his deceased wife being permitted by the law of *Denmark*?

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(o) 3 Macq. Sc. App. Rep. 497. (q) 3 Knapp, P. C. Cas. 257.
 (p) Milw. Ecc. Rep. (Ir.) 1.

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I am of opinion that this depends upon the question whether such a marriage would have been held illegal, and might have been set aside in a suit commenced in *England* in the lifetime of the parties before the passing of statute 5 & 6 *Will.* 4. c. 54, commonly called Lord *Lyndhurst's* Act.

I quite agree with what was said by my noble and learned friend during the argument on the *Sussex* peerage, that this Act was not brought in to prohibit a man from marrying his former wife's sister, and that it does not render any marriage illegal in *England* which was not illegal before. The object of the second section was to remedy a defect in our procedure, according to which marriages illegal, as being within the prohibited degrees either of affinity or consanguinity, however contrary to law, human and divine, and however shocking to the universal feelings of Christians, could not be questioned after the death of either party. But no marriage that was before lawful was prohibited by the Act; and I am of opinion that no marriage can now be considered void under it, which, before the Act, might not, in the lifetime of the parties, have been avoided and set aside as illegal.

There can be no doubt that before Lord *Lyndhurst's* Act passed, a marriage between a widower and the sister of a deceased wife, if celebrated in *England*, was unlawful, and in the lifetime of the parties could have been annulled. Such a marriage was expressly prohibited by the legislature of this country, and was prohibited expressly on the ground that it was "contrary to God's law." Sitting here, judicially, we are not at liberty to consider whether such a marriage is or is not "contrary to God's law," nor whether it is expedient or inexpedient.

Before the Reformation the degrees of relationship by

consanguinity and affinity, within which marriage was forbidden were almost indefinitely multiplied; but the prohibition might have been dispensed with by the Pope, or those who represented him. At the Reformation, the prohibited degrees were confined within the limits supposed to be expressly defined by Holy Scripture, and all dispensations were abolished. The prohibited degrees were those within which intercourse between the sexes was supposed to be forbidden as incestuous, and no distinction was made between relationship by blood or by affinity. The marriage of a man with a sister of his deceased wife is expressly within this category. *Hill v. Good* (r) and *Reg. v. Chadwick* (s) are solemn decisions that such a marriage was illegal; and if celebrated in England such a marriage unquestionably would now be void.

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Indeed, this is not denied on the part of the Appellants. They rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted.

There can be no doubt of the general rule, that "a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the mar-

(r) Vaugh. 302.

(s) 11 Q. B. Rep. 173, 205.

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riage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.

This qualification upon the rule that “a marriage valid where celebrated is good everywhere,” is to be found in the writings of many eminent jurists who have discussed the subject.

I will give one quotation from Huberus de Conflictu Legum, Bk. 1, tit. 3, s. 2, “*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*” Then he gives “marriage” as the illustration: “*Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione, prejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit,*” Id. sec. 8. The same great jurist observes: “*Non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt.*” Id s. 10.

Mr. Justice Story, in his valuable treatise on “the Conflict of Laws,” while he admits it to be the “rule that a marriage valid where celebrated is good everywhere,” says(*t*) there are exceptions; those of marriages involving

(*t*) S. 113 a.

polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country, he adds (u), “in respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognise polygamy or incestuous marriages; but when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous.” The conclusion of this sentence was strongly relied upon by Sir *FitzRoy Kelly*, who alleged that many in *England* approve of marriage between a widower and the sister of his deceased wife; and that such marriages are permitted in Protestant states on the Continent of Europe and in most of the States in *America*.

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Sitting here as a judge to declare and enforce the law of *England* as fixed by King, Lords, and Commons, the supreme power of this realm, I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion of the majority of my fellow citizens at home, or to try to find out the opinion of all Christendom. I can as a judge only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of foreign nations? Is my interpretation of these laws to vary with the variation of opinion in foreign countries? Change of opinion on any great question, at home or abroad, may be

(u) S. 114.

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a good reason for the legislature changing the law, but can be no reason for judges to vary their interpretation of the law.

Indeed, as *Story* allows marriages positively prohibited by the public law of a country, from motives of policy, to form an exception to the general rule as to the validity of marriage, he could hardly mean his qualification to apply to a country like *England*, in which the limits of marriages to be considered incestuous are exactly defined by public law.

That the Parliament of *England* in framing the prohibited degrees within which marriages were forbidden, believed and intimated the opinion, that all such marriages were incestuous and contrary to God's word I cannot doubt. All the degrees prohibited are brought into one category, and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before *English* tribunals, till the law is altered, they are to be treated alike.

An attempt has been made to prove that a marriage between a man and the sister of his deceased wife is declared by Lord *Lyndhurst's* Act to be no longer incestuous. But the enactment relied upon applies equally to all marriages within the prohibited degrees of affinity, and on the same reasoning would give validity to a marriage between a step-father and his step-daughter, or a step-son and his step-mother, which would be little less revolting than a marriage between parties nearly related by blood.

The general principles of jurisprudence which I have expounded have uniformly been acted upon by *English* tribunals. Thus, in the great case of *Hill v. Good* (v),

(v) *Vaugh. Rep.* 302.

Lord Chief Justice *Vaughan* and his brother Judges of the Court of Common Pleas, held, that “When an Act of Parliament declares a marriage to be against God’s law, it must be admitted in all courts and proceedings of the kingdom to be so.”

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In *Harford v. Morris* (w) the great judge who presided clearly indicates his opinion, that marriages celebrated abroad are only to be held valid in *England*, if they are according to the law of the country where they are celebrated, and if they are not contrary to the law of *England*. He adds, “I do not say that foreign laws cannot be received in this court, in cases where the courts of that country had a jurisdiction. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the court to determine by those foreign laws.”

I will only give another example, the case of *Warrender v. Warrender* (x), in which I had the honour to be counsel at your Lordships’ bar. Sir *George Warrender*, born and domiciled in *Scotland*, married an Englishwoman in *England* according to the rites and ceremonies of the church of *England*; but instead of changing his domicile, he meant that his matrimonial residence should be in *Scotland*, where he had large landed estates, on which his wife’s jointure was charged. Having lived a short time in *Scotland*, they separated. Sir *George*, continuing domiciled in *Scotland*, commenced a suit against her in the Court of Session, for a dissolution of the marriage on the ground of adultery alleged to have been committed by her on the continent of Europe. It was objected that this being marriage celebrated in *England*, a country in which by the then existing law, marriage was indissoluble, the *Scotch* court had no jurisdiction to dis-

(w) 2 Hagg. Con. Rep. 423, 434.

(x) 2 Clark & Fin. 488.

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solve the marriage, and *Lol/y's* case was relied upon, in which a domiciled Englishman having been married in *England*, and while still domiciled in *England*, having been divorced by decree of the Court of Session in *Scotland*, and having afterwards married a second wife in *England*, his first wife being still alive, he was convicted of bigamy in *England*, and held by all the judges to have been rightly convicted, because the sentence of the *Scotch* court dissolving his first marriage was a nullity. But your Lordships unanimously held that as Sir *George Warrender* at the time of his marriage was a domiciled Scotchman, and *Scotland* was to be the conjugal residence of the married couple, although the law of *England* where the marriage was celebrated, regulated the ceremonies of entering into the contract, the essentials of the contract were to be regulated by the law of *Scotland*, in which the husband was domiciled, and that although by the law of *England*, marriage was indissoluble, yet as by the law of *Scotland*, the tie of marriage might be judicially dissolved for the adultery of the wife, the suit was properly constituted, and the Court of Session had authority to dissolve the marriage.

It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

A marriage between a man and the sister of his deceased wife, being *Danish* subjects domiciled in *Denmark*, may be good all over the world, and this might likewise be so, even if they were native born *English* subjects, who had abandoned their *English* domicile, and were domiciled in

Denmark. But I am by no means prepared to say, that the marriage now in question ought to be, or would be, held valid in the *Danish* courts, proof being given that the parties were *British* subjects domiciled in *England* at the time of the marriage, that *England* was to be their matrimonial residence, and that by the law of *England* such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

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Sir *FitzRoy Kelly* argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of *Danish* subjects who contracted such a marriage in *Denmark* while domiciled in their native country, if they should come to reside in *England*. But on the principles which I have laid down, such marriages, if examined, would be held valid in all *English* courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated.

I may here mention another argument of the same sort brought forward by Sir *FitzRoy Kelly*, that our courts have not jurisdiction to examine the validity of marriages celebrated abroad according to the law of the country of celebration, because, as he says, the Ecclesiastical Courts, which had exclusive jurisdiction over marriage, must have treated them as valid. But I do not see anything to have prevented the Ecclesiastical Court from examining and deciding this question. Suppose in a probate suit the validity of a marriage had been denied, its validity must have been determined by the Ecclesiastical Court,

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according to the established principles of jurisprudence, whether it was celebrated at home or abroad.

Sir *FitzRoy Kelly* farther argued with great force, that both Sir *Cresswell Cresswell* and Vice Chancellor *Stuart* have laid down that Lord *Lyndhurst's* Act binds all *English* subjects wherever they may be, and prevents the relation of husband and wife from subsisting between any subjects of the realm of *England* within the prohibited degrees. I am bound to say, that in my opinion this is incorrect, and that Lord *Lyndhurst's* Act would not affect the law of marriage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony. I again repeat that it was not meant by Lord *Lyndhurst's* Act to introduce any new prohibition of marriage in any part of the world. For this reason, I do not rely on the *Sussex Peerage Case* as an authority in point, although much reliance has been placed upon it; my opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord *Lyndhurst's* Act on all *Englishmen*, and carried about with them all over the world; but on the ground of the marriage being prohibited in England as "contrary to God's Law."

I will now examine the authorities relied upon by the counsel for the Appellants. They bring forward nothing from the writings of jurists except the general rule, that contracts are to be construed according to the *lex loci contractus*, and the saying of *Story* with regard to a marriage being contrary to the precepts of the Christian religion, upon which I have already commented.

But there are various decisions which they bring forward as conclusive in their favour. They begin with *Compton v. Bearcroft*, and the class of cases in which it was held that *Gretna Green* marriages were valid in *Eng-*

land, notwithstanding Lord *Hardwicke's* Marriage Act, 26 *Geo.* 2, c. 33. In observing upon them, I do not lay any stress on the proviso in this Act that it should not extend to marriages in *Scotland* or beyond the seas; this being only an intimation of what might otherwise have been inferred, that its direct operation should be confined to *England*, and that marriages in *Scotland* and beyond the seas should continue to be viewed according to the law of *Scotland* and countries beyond the seas, as if the act had not passed. But I do lay very great stress on the consideration that Lord *Hardwicke's* Act only regulated banns and licenses, and the formalities by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in *England*, and the whole frame of it shows it was only territorial. The nullifying clauses about banns and licenses can only apply to marriages celebrated in *England*. In this class of cases the contested marriage could only be challenged for want of banns or license in the prescribed form. These formalities being observed, the marriages would all have been unimpeachable. But the marriage we have to decide upon has been declared by the legislature to be "contrary to God's law," and on that ground it is absolutely prohibited. Here I may properly introduce the words of Mr. Justice *Coleridge* in *Reg. v. Chadwick* (*y*), "We are not on this occasion inquiring what God's law or what the Levitical law is. If the Parliament of that day [*Hen.* 8] legislated on a misinterpretation of God's law we are bound to act upon the statute which they have passed."

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(*y*) 11 Q. B. Rep. 238.

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The Appellant's counsel next produced a new authority, the very learned and lucid judgment of Dr. *Radcliff*, in *Steele v. Braddell* (z). The *Irish* statute, 9 *Geo.* 2, c. 11, enacts, "that all marriages and matrimonial contracts, when either of the parties is under the age of twenty-one, had without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes; and that it shall be lawful for the father or guardian to commence a suit in the proper Ecclesiastical Court in order to annul the marriage." A young gentleman, a native of *Ireland*, and domiciled there, went while a minor into *Scotland*, and there married a *Scottish* young lady without the consent of his father or guardian. A suit was brought by his guardian in an Ecclesiastical Court in *Ireland*, in which Dr. *Radcliff* presided, to annul the marriage on the ground that this statute created a personal incapacity in minors, subjects of *Ireland*, to contract marriage, in whatever country, without the consent of father or guardian. But the learned Judge said, "I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it, on the principle that parties endeavoured to evade it." And after an elaborate view of the authorities upon the subject, he decided that both parties being of the age of consent, and the marriage being valid by the law of *Scotland*, it could not be impeached in the courts of the country in which the husband was domiciled, and he dismissed the suit. But this was a marriage between parties who, with the consent of parents and guardians, might have contracted a valid marriage according to the law of the country of the husband's domicile, and the mode of celebrating the marriage was to be

(z) *Milw. Ecc. Rep. (Ir.)* 1.

according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of *Ireland* as “contrary to the word of God,” undoubtedly the marriage would have been dissolved. Dr. *Radcliff* expressly says, “it cannot be disputed that every state has the right and the power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments and not according to the laws of the country wherein it was formed.”

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Another new case was brought forward, decided very recently by Sir *Cresswell Cresswell*, *Simonin v. Mallac* (a). This was a petition by *Valerie Simonin* for a declaration of nullity of marriage. The Petitioner alleged that a pretended ceremony of marriage was had between the Petitioner and *Leon Mallac* of *Paris*, in the parish church of *St. Martin's-in-the-Fields*; that about two days afterwards the parties returned to *Paris*, but did not cohabit, and the marriage was never consummated; that the pretended marriage was in contradiction to and in evasion of the *Code Napoleon*; that the parties were natives of and domiciled in *France*, and that subsequently to their return to *France* the Civil Tribunal of the department of the *Seine* had, at the suit of *Leon Mallac*, declared the said pretended marriage to be null and void. *Leon Mallac* was served at *Naples* with a citation and a copy of the petition, but did not appear. Proof was given of the material allegations of the petition, and that the parties coming to *London* to avoid the *French* law, which required the consent of parents or guardians to their union, were married by license in the parish church of *St. Martin's-in-the-Fields*. Sir *Cresswell Cresswell*, after the

(a) 29 Law J., Probate & Mat., 97.

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case had been learnedly argued on both sides, discharged the petition. But was there anything here inconsistent with the opinion which the same learned Judge delivered as assessor to Vice-Chancellor *Stuart* in *Brook v. Brook*? Nothing whatever; for the objection to the validity of the marriage in *England* was merely that the forms prescribed by the *Code Napoleon* for the celebration of a marriage in *France* had not been observed. But there was no law of *France*, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of *France* would have been unimpeachable. The case, therefore, comes into the same category as *Compton v. Bearcroft* and *Steele v. Braddell*, decided by Dr. *Radcliff*. None of these cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled.

Some *American* decisions, cited on behalf of the Appellants, remain to be noticed. In *Greenwood v. Curtis* (b), the general doctrine was acted upon that a contract, valid in a foreign state, may be enforced in a state in which it would not be valid, but with this important qualification, "unless the enforcing of it should hold out a bad example to the citizens of the state in which it is to be enforced." Now the legislature of *England*, whether wisely or not, considers the marriage of a man with the sister of his deceased wife "contrary to God's law," and of bad example.

Medway v. Needham (c), according to the marginal note, decides nothing which the counsel for the Respon-

(b) 6 Mass. Rep. 358.

(c) 16 Mass. Rep. 157.

dents need controvert. “A marriage which is good by the laws of the country where it is entered into, is valid in any other country; and although it should appear that the parties went into another state to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will, nevertheless, be valid in the country in which the parties live; *but this principle will not extend to legalize incestuous marriages so contracted.*” This judgment was given in the year 1819. As in *England*, so in *America*, some very important social questions have arisen on cases respecting the settlement of the poor. Whether the inhabitants of the district of *Medway*, or the inhabitants of the district of *Needham*, were bound to maintain a pauper, depended upon the validity of a marriage between a Mulatto and a white woman. They were residing in the province of *Massachusetts* at the time of the supposed marriage, which was prior to the year 1770. As the laws of the province at that time prohibited all such marriages, they went into the neighbouring province of *Rhode Island*, and were there married according to the laws of that province. They then returned to *Massachusetts*. Chief Justice *Parker*, held that the marriage was there to be considered valid, and, so far, the case is an authority for the Appellants. But I cannot think that it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of *Huberus* and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and in the country of domicile were different; and he took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the

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distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognised as lawful. Indeed Chief Justice *Parker* expressly allowed that his doctrine would not extend to cases in which the prohibition was grounded on religious considerations, saying, "If without any restriction, then it might be, that incestuous marriages might be contracted, between citizens of a state where they were held unlawful and void, in countries where they were prohibited."

The only remaining case is *Sutton v. Warren* (*d*). The decision in this case was pronounced in 1845. I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding *American* decisions resting upon general jurisprudence. The question was, whether a marriage celebrated in *England* on the 24th of *November* 1834, between *Samuel Sutton* and *Ann Hills*, was to be held to be a valid marriage in the state of *Massachusetts*. The parties stood to each other in the relation of aunt and nephew, *Ann Hills* being own sister of the mother of *Samuel Sutton*. They were both natives of *England*, and domiciled in *England* at the time of their marriage. About a year after their marriage they went to *America*, and resided as man and wife in the state of *Massachusetts*. By the law of that state a marriage between an aunt and her nephew is prohibited, and is declared null and void. Nevertheless, the supreme court of *Massa-*

(*d*) 10 Met. Mass. Rep. 451.

chusetts held that this was to be considered a valid marriage in *Massachusetts*. But I am bound to say that the decision proceeded on a total misapprehension of the law of *England*. Justice *Hubbard*, who delivered the judgment of the court, considered that such a marriage was not contrary to the law of *England*. Now there can be no doubt that although contracted before the passing of 5 & 6 *Will.* 4, c. 54, it was contrary to the law of *England*, and might have been set aside as incestuous, and that Act gave no protection whatsoever to a marriage within the prohibited degrees of consanguinity; so that if *Samuel Sutton* and *Ann Hills* were now to return to *England*, their marriage might still be declared null and void, and they might be proceeded against for incest. If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the state in which it was celebrated, and in which the parties were domiciled, is to be held valid in another state into which they emigrate, although by the law of this state, as well as of the state of celebration and domicile, such a marriage is prohibited and declared to be null and void. This decision, my Lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers ever since the Reformation.

I have now, my Lords, as carefully as I could, considered and touched upon the arguments and authorities brought forward on behalf of the Appellants, and I must say that they seem to me quite insufficient to show that the decree appealed against is erroneous.

The law upon this subject may be changed by the Legislature, but I am bound to declare that in my opinion, by the existing law of *England* this marriage is

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invalid. It is therefore my duty to advise your Lordships to affirm the decree, and dismiss the appeal.

Lord *Cranworth* :

My Lords, the important question to be decided in this case is, whether the marriage contracted in 1850, between *William Leigh Brook*, a widower, and *Emily Armitage*, the sister of his deceased wife, in *Denmark*, where such marriages are lawful, was a valid marriage in *England*, both parties to it being, at the time it was contracted, native born subjects of Her Majesty domiciled in *England*.

The Court of Chancery decided that it was invalid, as having been prohibited by the second section of the 5 & 6 *Will.* 4, c. 54.

One argument on behalf of the respondents was, that this enactment is of a nature so general and extensive that it must be construed as affecting all her Majesty's subjects wheresoever born or domiciled, so that it would operate throughout all our colonies, and on all who owe allegiance to the British Crown wheresoever they may be. I cannot concur in that construction of the statute; no doubt the Imperial Legislature can, and occasionally does legislate so as to affect our colonies, but ordinarily our Acts of Parliament speak only to the inhabitants of *Great Britain* and *Ireland*; and I see nothing to lead to the inference that the enactment in question was meant to have a wider import; indeed, the exception of *Scotland* in the next section seems to me, independently of other considerations, conclusive on the subject.

Excluding, then, this more extensive operation of the enactment, it seems plain that the prospective effect of the Act is to make all marriages within the prohibited degrees absolutely void, *ab initio*, dispensing with the

necessity of a sentence in the Ecclesiastical Court declaring them void.

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The persons whose marriages by the second section are declared to be void, are the same persons, and only the same persons, whose marriages before the passing of that Act might, during the lives of both parties, have been declared void by the Ecclesiastical Court.

The question, therefore, is, whether before the passing of that statute the Ecclesiastical Court could have declared the marriage now in dispute void. It certainly could, and must have done so if it had been celebrated in *England*; and all that your Lordships have to say is, whether the circumstance that it was celebrated in a foreign country, where such unions are lawful, would have altered the conclusion at which the Court ought to have arrived.

In the first place, there is no doubt that the mere fact of a marriage having been celebrated in a foreign country did not exclude the jurisdiction of the Ecclesiastical Court, while the jurisdiction as to marriages was exercised by that court. It was of ordinary occurrence that the court should entertain suits as to the validity of marriages contracted out of its jurisdiction. So that the question for decision is narrowed to the single point whether in deciding on the validity of this marriage, if it had come into discussion before the year 1835, and during the lives of both the parties, the Ecclesiastical Court would have been guided by the law of this country, or by that of the country where the marriage was contracted.

The case was most elaborately argued at your Lordships' bar, and we were referred to very numerous authorities bearing on the subject. The conclusion at which I have arrived is the same as that which my noble and

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learned friend on the Woolsack has come to, namely, that, though in the case of marriages celebrated abroad the *lex loci contractus* must *quoad solennitates* determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of Her Majesty domiciled in this country, might lawfully make.

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. And if the marriages of all its subjects were contracted within its own boundaries no such difficulty as that which has arisen in the present case could exist. But that is not the case; the intercourse of the people of all Christian countries among one another is so constant, and the number of the subjects of one country living in or passing through another is so great, that the marriage of the subject of one country within the territories of another must be matter of frequent occurrence. So, again, if the laws of all countries were the same as to who might marry, and what should constitute marriage, there would be no difficulty; but that is not the case, and hence it becomes necessary for every country to determine by what rule it will be guided in deciding on the validity of a marriage entered into beyond the area over which the authority of its own laws extends. The rule in this country, and I believe generally in all countries is, that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong.

The real question therefore is, whether the law of this

country, by which the marriage now under consideration would certainly have been void if celebrated in *England*, extends to *English* subjects casually being in *Denmark*?

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I think it does; of the power of the legislature to determine what shall be the legal consequences of the acts of its own subjects done abroad, there can be no doubt, and whether the operation of any particular enactment is intended to be confined to acts done within the limits of this country, or to be of universal application, must be matter of construction, looking to the language used and the nature and objects of the law.

It must be admitted that the statutes on this subject are in a confused state. But it must be taken as clear law that though the two statutes of *Hen. VIII.*, *i. e.*, the 25 *Hen. 8*, c. 22, and the 28 *Hen. 8*, c. 7 (being the only statutes which in terms prohibited marriage with a wife's sister as being contrary to God's law), are repealed, yet by two subsequent acts of the same reign, namely, the 28 *Hen. 8*, c. 16, and the 32 *Hen. 8*, c. 38, which had for their object to make good certain marriages, the prohibition is, in substance, revived or kept alive. For in both of them there is an exception of marriages prohibited by God's law, and in one of them, 28 *Hen. 8*, c. 16, the language of the exception is, "which marriages be not prohibited by God's laws limited and declared in the Act made in this present Parliament;" that is the repealed Act of the 28 *Hen. 8*, c. 7, s. 11; so that it is to that Act, though repealed, that we are to look in order to see what marriages the legislature has prohibited as being contrary to God's law. It was, perhaps, unnecessary to advert to this after the decision of the Court of Queen's Bench in *Reg. v. Chadwick (e)*, but

(e) 11 Q. B. Rep. 173.

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it is fit that the grounds on which we proceed should be made perfectly clear.

Assuming, then, as we must, that such marriages are not only prohibited by our law, but prohibited because they are contrary to the law of God, are we to understand the law as prohibiting them wheresoever celebrated, or only if they are celebrated in *England*? I cannot hesitate in the answer I must give to such an inquiry. The law, considering the ground on which it makes the prohibition, must have intended to give to it the widest possible operation. If such unions are declared by our law to be contrary to the laws of God, then persons having entered into them, and coming into this country, would, in the eye of our law, be living in a state of incestuous intercourse. It is impossible to believe that the law could have intended this.

It was contended that, according to the argument of the Respondent, such a marriage, even between two *Danes*, celebrated in *Denmark*, must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our laws which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction.

The authorities showing that the general rule which gives validity to marriages contracted according to the laws of the place where they are contracted, is subject to

the qualification I have mentioned, namely, that such marriages are not contrary to the laws of the land to which the parties contracting them belong, have been referred to not only by my noble and learned friend, but in the able opinion of Sir *Cresswell Cresswell*, delivered in the Court below, as also in the judgment of the *Vice-Chancellor*. I abstain, therefore, from going into them in detail: to do so would only be to repeat what is already fully before your Lordships.

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I cannot, however, refrain from expressing my dissent from that part of Sir *Cresswell Cresswell's* able opinion, in which he repudiates a part of what is said by Mr. Justice *Story* as to marriages which are to be held void on the ground of incest. That very learned writer, after stating (*f*) that marriages valid where they are contracted, are, in general, to be held valid everywhere, proceeds thus: "The most prominent, if not the only known exceptions to the rule, are marriages involving polygamy or incest; those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the laws of their own countries." And then he adds that, "as to the first exception, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognize polygamy or incestuous marriages; but when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of all Christendom, are deemed incestuous." With this latter portion of the doctrine of Mr. Justice *Story*, Sir *Cresswell Cresswell* does not agree. But I believe that this passage, when correctly interpreted, is strictly consonant to the law of na-

(*f*) Sec. 113.

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tions. *Story*, there, is not speaking of marriages prohibited as incestuous by the municipal law of the country. If so prohibited, they would be void under his second class of exceptional cases; no inquiry would be open as to the general opinion of Christendom. But suppose the case of a Christian country, in which there are no laws prohibiting marriages within any specified degrees of consanguinity or affinity, or declaring or defining what is incest; still, even there, incestuous marriages would be held void, as polygamy would be held void, being forbidden by the Christian religion. But then, to ascertain what marriages are, within that rule, incestuous, a rule not depending on municipal laws, but extending generally to all Christian countries, recourse must be had to what is deemed incestuous by the general consent of Christendom. It could never be held that the subjects of such a country were guilty of incest in contracting a marriage allowed and approved by a large portion of Christendom, merely because, in the contemplation of other Christian countries, it would be considered to be against God's laws. I have thought it right to enter into this explanation, because it is important that a writer so highly and justly respected as Mr. Justice *Story* should not be misunderstood, as, with all deference, I think he has been in the passage under consideration.

Having thus expressed my opinion, I do not feel that I should usefully occupy your Lordships' time by going again over the cases which have been so carefully examined by my noble and learned friend. I agree with him that the cases decided as to *Gretna Green* marriages, do not assist the Appellants. Lord *Hardwicke's* Act, 26 *Geo.* 2, c. 33, directs that marriages shall only be celebrated after publication of banns, or by license; if either party is under age, the 11th section makes the marriage

void unless there has been the requisite consent of parent or guardian. That section evidently cannot be extended to marriages celebrated out of *England*; the necessity for banns or license clearly shows that the operation of the statute was to be confined to this country, and on that ground such marriages as those I have alluded to have always been deemed valid.

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It was on this same ground that the *Irish* case, *Steele v. Braddell*(*g*) was decided. Dr. *Radcliff* held that the *Irish* statute prohibiting the marriage of a minor without certain consents, was, from the nature of its provisions, and attending to all its enactments, to be deemed to be confined to marriages celebrated in *Ireland*; not that the nature of the provisions might not have been such as to show that its operation was intended to be universal; indeed he expressly stated the contrary. It has therefore no bearing on the present case, where the ground of the prohibition shows that it must have been meant to be of the widest possible extent.

I also concur entirely with my noble and learned friend that the *American* decision of *Medway v. Needham* cannot be treated as proceeding on sound principles of law. The state or province of *Massachusetts* positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds of distinction pointed out by Mr. Justice *Story*, such a marriage certainly ought to have been held void in *Massachusetts*, though celebrated in another province where such marriages were lawful.

I shall not farther detain your Lordships. I think that this marriage is one clearly prohibited by the statutes of *Henry VIII.* wheresoever celebrated; and therefore that

(*g*) Milw. Ecc. Rep. (Ir.) 1.

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the statute of 5 & 6 *Will.* 4, c. 54, makes it absolutely void.

I therefore concur in thinking that the appeal should be dismissed.

Lord *St. Leonards* :

My Lords, the question before the House is one of great importance, but not of much difficulty. The learned counsel for the Appellants insisted that as marriage was but a civil contract, it must, by international law, depend upon the law of the country where it is contracted, and that the question of domicile was excluded; that certain marriages in *Scotland* were allowed in *England* to be good, notwithstanding Lord *Hardwicke's* Marriage Act; and that but for the Act of *Will.* 4, this marriage could not be impeached. It was admitted that this country would not recognise a contract in a foreign country, which was contrary to religion or morality, or was criminal; but it was argued that the allowance of marriages, such as that under consideration, by other States, showed that they were not contrary to religion or morality, or criminal, and that the very Act of *Will.* 4, virtually repealed any former law of this country impeaching the validity of such marriages as contrary to the law of God; for if deemed to be contrary to God's law, Parliament would not have given legal validity to those which had been solemnised. And it was forcibly urged that no Act of Parliament treats a marriage with a deceased wife's sister as incestuous.

I consider this as purely an *English* question. It depends wholly upon our own laws, binding upon all the Queen's subjects. The parties were domiciled subjects here, and the question of the validity of the marriage will affect the right to real estate. *Warrender v. War-*

render (h), shows how the marriage contract may be affected by domicile. We cannot reject the consideration of the domicile of the parties in considering this question; I may at once relieve the case from any difficulty arising out of *Scotch* marriages in fraud, as it is alleged, of our Marriage Act. When those marriages are solemnised according to the law of *Scotland*, they are no fraud upon the Act, for it expressly, amongst other exceptions, provides that nothing contained in it shall extend to *Scotland*. Lord *Hardwicke* observed in *Butler v. Freeman (i)*, that there was a door open in the statute as to marriages beyond seas and in *Scotland*. I may observe that the door was purposely left open, and such marriages have no bearing upon the question before the House.

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The grounds upon which, in my opinion, this marriage in *Denmark* is void by our law, depend upon our Act of Parliament, and upon the rule that we do not admit any foreign law to be of force here, where it is opposed to God's law, according to our view of that law.

The argument, as I have already observed, for the Appellants, was, that no law in this country branded marriages with a deceased wife's sister as incestuous. Let us see how this stands. The 25 *Hen.* 8, c. 22, s. 3, states, "that many inconveniences have fallen as well within this realm *as in others*, by reason of marrying within degrees of marriage *prohibited by God's law*, that is to say," and then several instances are stated, "or any man to marry his wife's sister, which marriages albeit they be plainly prohibited and detested by the laws of God," and it then alludes to the "dispensations by man's power

(h) 2 Clark & Fin. 488.

(i) Ambl. 301.

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which is but usurped," and declares that no man hath power to dispense with God's law.

It then by section 4 enacts, "that no persons, subjects or residents of this realm, or in any of the King's dominions, should from thenceforth marry within the said degrees; and if any person had been married within this realm, or in any of the King's dominions, within any of the degrees above expressed, and by any Archbishop, &c. of the Church of *England*, should be separate from the bonds of such unlawful marriage, every separation should be good, and the children under such unlawful marriage should not be lawful nor legitimate, any foreign laws, &c. to the contrary notwithstanding."

The statute of 28 *Hen.* 8, c. 7, repealed the 25 *Hen.* 8, c. 22, but by section 7 again prohibited at large the marriages prohibited by the 25th *Hen.* 8. The marriage of a man with his wife's sister is included in the prohibition, and that and the other prohibited marriages the Act states to be "plainly prohibited and detested by the law of God." The statute 28 *Hen.* 8, c. 16, made good all past marriages whereof there was no divorce, and which marriages were not prohibited by God's laws, limited and declared in the Act made in this Parliament or otherwise by Holy Scripture.

These Acts were followed by the 32 *Hen.* 8, c. 38, "For marriages to stand, notwithstanding pre-contracts." It enacted that all marriages as within the Church of *England* which should be contracted between lawful persons (as by this Act were declared all persons to be lawful that were not prohibited by God's law to marry), were not to be affected by pre-contracts, and that no reservation or prohibition God's law except, should trouble or impeach any marriage without the Levitical degrees, and

no process to the contrary was to be admitted within any of the Spiritual Courts within this the King's realm, or any of his Grace's other lands and dominions.

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It appears from these Acts, that the marriage in question is by the law of *England* declared to be against God's law, and to be detested by God plainly, because, although there is only affinity between the parties, it was deemed, like cases of consanguinity, incestuous. We are not at liberty to consider whether the marriage is contrary to God's law, and detested by God; for our law has already declared such to be the fact, and we must obey the law. That law has been so clearly and satisfactorily explained by the learned Judges in the case of the *Queen v. Chadwick*, as to render it unnecessary to observe farther upon it, or to trace the repeals and re-enactments of the laws to which I have referred. As one of the learned Judges observed, we need not tread the labyrinth of statutes to discover which of the enactments in question has been repealed or revived, and which has not. We may use the prior acts simply as the best interpreters of the statute 32 *Hen. 8*, c. 38, which is clearly in force.

This brings us to the 5 & 6 *Will. 4*, c. 54, which was passed with a view to put an end to the uncertainty of the marriage contract arising from the decisions in our courts, that where the parties were within the prohibited degrees of affinity, the marriage was voidable only. The act drew a distinction between affinity and consanguinity. It enacted, that all past marriages between persons within the prohibited degrees of affinity, should not be annulled for that cause by any sentence of the Ecclesiastical Court; Provided that nothing in the Act should affect marriages between persons being within the prohibited degrees of consanguinity. And the Act then proceeds to enact, that all marriages which should thereafter be celebrated

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between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever. The recital stated the intention to make them *ipso facto* void, and not voidable. Nothing can be plainer. The statute created no farther prohibition; it treated the legal prohibition already in existence as well known by the general description in the Act. The construction of the Act was settled by the *Queen v. Chadwick (j)*, the law of which case was not disputed at the bar. By that decision the marriage now in question would have been absolutely void had it been contracted in *England*.

This case, then, is reduced to the simple question, Is the marriage valid in this country because it was contracted in *Denmark*, where a marriage with a deceased wife's sister is valid? This depends upon two questions, either of which, if adverse to the Appellants, would be fatal to the validity of the marriage, namely, first, will our courts admit the validity of a marriage abroad by an *English* subject domiciled here with his deceased wife's sister, because the marriage is valid in the country where it was contracted? Secondly, is such a marriage struck at by 5 & 6 *Will.* 4.

I think that the marriage has no validity in this country on the first ground, for by our law such a marriage is forbidden, as contrary, in our view, to God's law. The objection that Parliament gave validity to such marriages already had, in cases of affinity, is no reason why, when we have in future carefully made all such marriages absolutely void, we should admit their validity in favour of the law of a foreign country. The learned Judge who assisted the learned *Vice-Chancellor* in the Court below, came to

(j) 11 Q. B. Rep. 173.

the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid, if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it.

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I shall not, however, dwell upon this point, because I think that upon the second point the marriage is clearly invalid. The Appellant relies upon the silence of the Act in respect to marriages abroad. Now the Act is general, and contains a large measure of relief as well as a prohibition. It gives validity to *all* marriages celebrated before the passing of the Act, by persons being within the prohibited degrees of affinity. This is unlimited, and we could hardly hold that such of those persons as had been married abroad were excluded from the benefit of the Act. Why should the relief be confined, and not allowed as large a range as the words will admit? Clearly no intention appears to limit the operation of the words. The next clause, which nullifies the contract, is equally unlimited. *All* marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity are declared to be null and void. We must give the same interpretation to the words in this section as to those in the former section. To whatever class the relief was extended, to the same class, in addition to those within the prohibited degrees of consanguinity, the prohibition must be applied. It is of course not denied that three or four additional words would have put the question at rest. But why when the words are "*all* marriages," without making any exception, are we to introduce an exception in order to give validity to the very marriages which the legislature in-

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tended to render null and void? The marriage now under consideration shows how expedient it was that the law should prohibit it. It is not like the exception in the Marriage Act of marriages in *Scotland*, which enabled parties, without any real evasion of the law, to marry there without the forms imposed by the Act. What was intended was expressed. Here, on the contrary, the enactment is general and unqualified; and as it was intended to create a personal inability, there is of course no exception. The answer to the argument that the very case is not provided for in so many words, is, that, with the Marriage Act before them, the framers of the new law would have introduced an exception to meet this case, if such had been the intention. But when we advert to the nature of the contract, and the state of our law in relation to such a contract, which law was not altered by the new enactment, and bear in mind that the contrary law in a foreign country ought to receive no sanction here, opposed as it is to our law declaring such a contract to be contrary to God's law, we cannot fail to perceive that this case falls directly within the enactment that *all* such marriages shall be null and void.

Authority is not wanting in favour of this construction. The Royal Marriage Act, as your Lordships are aware, has been held in this House to extend to marriages abroad. And yet how much weaker a case was that than the one now before us. In it there was no infraction of God's law as declared by our law. The prohibition there rested only on political grounds. There were difficulties to surmount in extending the Act to marriages abroad, which do not occur in this case; the last clause, which makes persons who assist in celebrating the forbidden marriages incur the pains and penalties, makes the Act a highly penal one.

The invalidity of the marriage of the Duke of *Sussex* at *Rome*, without the king's consent, was declared by this House (*k*), with the assistance of six law Lords and seven common law Judges. The unanimous opinion of the Judges was delivered by Lord Chief Justice *Tindal*. He stated the only rule of construction of Acts of Parliament to be, that they should be construed according to the intent of the Parliament which passed them. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. The Act created a personal inability in the Duke to contract a marriage without consent. The prohibitory words were general, that every marriage or matrimonial contract of any such person shall be null and void. As a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage in *Rome* is as clearly within the prohibitory words of the statute as the incapacity to contract it in *England*. So again as to the second or annulling branch of the enactment, "that every marriage without such consent shall be null and void;" the words employed are general, or more properly universal, and cannot be satisfied in their plain literal ordinary meaning, unless they are held to extend to all marriages in whatever part of the world they may have been contracted or celebrated. The learned Chief Justice then addressed himself to the 2d section of the Act, and made an observation strongly applicable to my observations on the operation of the 5 & 6 *Will.* 4, in rendering valid, as I submit, former marriages wherever

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(*k*) 11 Clark & F. 85.

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celebrated. He said, as no doubt could be entertained by any one but that a marriage taking place with the due observance of the requisites of the 2d section, would be held equally valid, whether contracted and celebrated at *Rome* or in *England*, so the Judges thought it would be contrary to all established rules of construction if the very same words in the 1st section were to receive a different sense from those in the 2d; if it should be held that a marriage in *Rome* contracted with reference to the 2d section is made valid, and at the same time a marriage at *Rome* is not prohibited under the first; surely (the Chief Justice added), if a marriage of a descendant of *Geo. II.* contracted or celebrated in *Scotland* or *Ireland*, or on the continent, is to be held a marriage not prohibited by this Act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

I think your Lordships will agree with me that the opinions of the learned Judges in the royal marriage case strictly apply to this case, and ought to rule it; I adopt every one of those opinions without reserve. It is true that the Acts are not framed, as they could not be, exactly alike; because the Royal Marriage Act did not intend to establish an absolute prohibition, unless in the last resort. But where that Act, and the Act of *Will. 4* have the same object, viz., the annulling and rendering void a marriage contracted contrary to their provisions, they are identical, and cannot admit of two constructions.

I may observe that these were difficulties in the Duke of *Sussex's* case, with which we have not to contend here; but the Judges were of opinion, and this House held, that the clause requiring the consent to be set out in the license and register of the marriage, was directory only, and applied only to a marriage in *England* by license. The

defect in the penal clause in not making provision for the trial of *British* subjects when they violate the statute out of the realm, did not operate to make the enactment itself substantially useless and inoperative.

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Upon the whole, therefore, I am clearly of opinion that this marriage was rendered void by the Act of *Will. 4*, and I concur with my noble and learned friend on the woolsack, that the appeal should be dismissed, and the decree of the *Vice-Chancellor* affirmed.

Lord *Wensleydale* :

My Lords, I agree in the opinion expressed by my noble and learned friend on the woolsack, and my other noble and learned friends who have followed him ; and, after fully considering the arguments and judgments in the Court below, as well as the arguments addressed to your Lordships on the appeal, that you ought to affirm the decree of the Court below.

The question to be decided is, as the *Lord Chancellor* stated, whether a marriage celebrated on the 7th *June* 1850, in the duchy of *Holstein*, between a widower and the sister of his deceased wife, both being then *British* subjects domiciled in *England*, and contemplating *England* as their future matrimonial residence, is valid in *England*, such a marriage being permitted by the law of *Holstein*. The question what the consequences would have been if the parties had been *English* subjects domiciled there, is not the subject of inquiry. The sole question relates to *British* domiciled subjects.

Both the Judges in the Court below form their judgment, first, on the ground of the illegality of such a marriage in *England*, prohibited from very early times by the legislature, and finally by Lord *Lyndhurst's* Act, 5 & 6 *Will. 4*, c. 54 ; secondly, on the ground that that Act

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itself is to be considered as a personal Act, in effect prohibiting all *British* born subjects, in whatever part of the world they might happen to be, from contracting such marriages, and declaring those marriages to be absolutely void. It was likened by them to the Royal Marriage Act, the 12 *Geo.* 3, c. 11, which was clearly an Act affecting personally the descendants of King *George* II., in the realm, or out of it. That appears from the language of the Act itself, and the object it had in view.

It is unnecessary to enter into the discussion of this part of the case, if the other ground is satisfactory, which I think it is. But as at present advised, I dissent upon this point from my noble and learned friend who has just addressed your Lordships. I think the construction put upon this as a personal Act is wrong. I do not think the purpose of the statute was to put an end to such marriages by *British* subjects in any part of the world. Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable, that is, which were really void according to our law, though they could be avoided only by a suit in the Ecclesiastical Court, and that could be done only during the life of both the married parties.

The question, then, appears to me to be reduced to this single point: Was this such a marriage as the Ecclesiastical Court would have set aside if an application had been made to it for that purpose during the lives of both the married parties previous to the passing of the Act 5 & 6 *Will.* 4, c. 54? If it would have been voidable in that case before that Act, it is now by its operation absolutely void. I think it clear that it would have been set aside, and that the view taken particularly by Sir *Cresswell*

Cresswell in the first part of his opinion upon this part of the case is perfectly correct.

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It is the established principle that every marriage is to be universally recognised, which is valid according to the law of the place where it was had, whatever that law may be. This is the doctrine of Lord *Stowell* in the case of *Herbert v. Herbert* (l). The same doctrine has been laid down in various authorities, as by Sir *Edward Simpson*, in *Scrimshire v. Scrimshire* (m), and by *Story* and others. If valid where it was celebrated, it is valid everywhere, as to the constitution of the marriage and as to its ceremonies ; but as to the rights, duties, and obligations thence arising, the law of the domicile of the parties must be looked to. That is laid down by *Story* (n).

But this universally approved rule is subject to a qualification. *Huber*, in his 1st Book, Tit. 3, Art. 8, says, "*Matrimonium si licitum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eâdem exceptione, prejudicii aliis non creandi ; cui licet addere, si exempli nimis sit abominandi ; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum ; quod vix est ut usu venire possit.*"

A similar qualification is introduced by *Story* (o). He states, that the most prominent, if not the only, known exceptions to the rule, are, first, those marriages involving polygamy and incest ; second, those positively prohibited by the public law of a country from motives of policy, and a third having no bearing upon the question before us. And as to the first exception, he adds, that "Christianity is understood to prohibit polygamy and incest, but this doctrine must be confined to such cases as by

(l) 2 Hagg. Cons. Rep. 271.

(m) Id. 417.

(n) Conf. of Laws, s. 110.

(o) Id. ss. 113 a, 114.

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general consent of all Christendom are deemed incestuous."

It would seem enough to say, that the present case falls within the two exceptions, for it is no doubt prohibited by the public law of this country. And it is by no means improbable, that *Story's* meaning was to apply his first exception only to those cases to which the second could not apply, as suggested by my noble and learned friend; to those cases, namely, in which there was no particular law in the country of the domicile of the parties to such marriages. And in that sense the position of *Story* is unobjectionable. His meaning would have been more clearly expressed, if the second exception had been put the first, and the first made to apply where no such particular law existed.

It strikes me that this view of the case is correct. And, therefore, it is in reality quite unnecessary to discuss the question whether, where a marriage is objected to, not on the ground of its being against the positive prohibition of a country, but on the ground of incest, where there is no such prohibition, the incest must be of such a character as is described in the first exception.

If that question is to be considered, I perfectly agree with the convincing reasoning of Sir *Cresswell Cresswell* on this point of the case. What have we to do with the general consent of Christendom, on the subject of incest, in a question which relates to our own country alone? Amongst Christian nations different doctrines prevail, and surely the true question would be, not, what is the doctrine of Christianity generally, in which all agree, nor what is the prevailing doctrine of Christian nations, but what is the doctrine, on this subject, of that branch of Christianity which this country professes. If it is condemned by us as forbidden by the law of God in Holy

Scripture, it is no matter what opinions other Christian nations entertain on this question. This reasoning appears so very clear, that I must think that so able a man as Mr. Justice *Story* could never have meant to lay down the proposition that where any country prohibited a marriage on account of incest, it must be of such quality of incest as to be of that character in universal Christendom. If he really did mean to state such a proposition, I must say I think it cannot be supported.

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I proceed, therefore, though I think it unnecessary, to show that this sort of marriage is forbidden in this country on the ground of its being against the law of God deduced from Holy Scripture. We have a distinct and clear opinion on this subject in a well-considered judgment of the Court of Queen's Bench in the case of *The Queen v. Chadwick* (*p*), which was argued for several days; and in which Lord *Denman*, Mr. Justice *Coleridge*, and Mr. Justice *Wightman* delivered very full and satisfactory judgments. It was held, that marriages within the prohibited degrees mentioned in the statute 5 & 6 Will. 4, c. 54, were those within the *Levitical* degrees, which, having been before voidable by suit in the Ecclesiastical Court, were by that statute absolutely avoided. The marriage of a widower with his wife's sister was considered as clearly falling within this class. The legislative declarations in *Henry VIII.*'s reign were considered as statutory expositions of what was intended by the term "*Levitical* degrees," whether those statutes in which they occur are repealed or not.

If we are to inquire into the latter question, whether they are repealed or not, it will require some research.

(*p*) 11 Q. B. Rep. 173. 205.

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The whole question is ably and distinctly stated in a note appended by the learned editor to the case of *Sherwood v. Ray* (q).

The state of the law appears to be this:—the two statutes in which the term “*Levitical* degrees” is explained are the 25 *Hen.* 8, c. 22, where they are enumerated, and include a wife’s sister, and the 28 *Hen.* 8, c. 7, in the ninth section of which are described, by way of recital, the degrees prohibited by God’s laws in similar terms, with the addition of carnal knowledge by the husband in some cases; and with respect to them, the prohibition of former statutes was re-enacted.

The whole of this Act, 25 *Hen.* 8, c. 22, was repealed by a statute of Queen *Mary*; and so was part of 28 *Hen.* 8, c. 7, but not the part as to the prohibited degrees. That part was repealed by 1 & 2 *Philip & Mary*, c. 8. But by the 1 *Eliz.*, c. 1, s. 2, that Act itself was repealed, except as therein mentioned, and several Acts were revived, not including the 28 *Hen.* 8, c. 7; no doubt because it avoided the marriage with *Ann Boleyn*. But by the 10th section of the 28 *Hen.* 8, c. 16 (which in the second section referred to marriages prohibited by God’s laws as limited and declared in the 28 *Hen.* 8, c. 7, or otherwise by Holy Scripture), all and every “branches, words and sentences, in those several Acts contained, are revived and are enacted to be in full force and strength to all intents and purposes.” The question is, whether that part of 28 *Hen.* 8, c. 7, which relates to prohibited degrees and describes them, is thus revived? I think it is. But whether it is or not, the statements in the statutes are to be looked at

(q) 1 Moo. P. C. Rep. 353, 355 (a).

as a statutory exposition of the meaning of the term, "Levitical degrees." And that is the clear opinion of Lord *Denman* and Mr. Justice *Coleridge* in the case to which I refer.

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The statute law of the country, which is binding on all its subjects, therefore, must be considered as pronouncing that this marriage is a violation of the Divine law, and therefore that it is void within the first exception made by Mr. Justice *Story*, and within the principle of the exception laid down by *Huber*. If our laws are binding, or oblige us, as I think they do, to treat this marriage as a violation of the commands of God in Holy Scripture, we must consider it in a court of justice, as prejudicial to our social interest and of hateful example. But if not, it most clearly falls within the second exception stated by *Story*, which alone, I think, need be considered, as it is clearly illegal by the law of this country, whether it be considered incestuous or not, and a violation of that law.

I do not, therefore, in the least doubt that before the 5 & 6 *W.* 4, it would have been pronounced void by the Ecclesiastical Court on a suit instituted during the life of both parties. And therefore I advise your Lordships that the judgment should be affirmed.

Order appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 18 *March* 1861.

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 —
*Railway
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 Discretion as
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The DIRECTORS, &c. of the STOCKTON and } *Appellants.*
 DARLINGTON RAILWAY COMPANY - }
 JOHN BROWN, a Lunatic, by his Com- } *Respondent.*
 mittees - - - - - }

WHEN the legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Acts, it constitutes them the judges whether they will or not take these lands, provided that they act with the *bonâ fide* object of using the lands for the purposes authorised by the Act, and not for any collateral purpose. Having provided for affording compensation to the owners of the lands, the Legislature leaves it to the company to determine what lands are necessary to be taken.

Qu. Whether the words "the Court of Chancery," in the 5th section of the 18 & 19 *Vict.*, c. cxlix (the *Stockton and Darlington* Railway Act), apply exclusively to the *Lord Chancellor* or to the Lords Justices sitting in Lunacy?

The *Vice-Chancellor* made a decree which was afterwards varied by the Lords Justices. This House restored the decree of the *Vice-Chancellor*, and farther proceedings being necessary, remitted the cause to him, to proceed with it in the same state in which it was when brought by appeal before the Lords Justices.

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THIS was a question as to the right of the Appellants to take for the purposes of their railway certain lands belonging to the Respondent, and it depended on the construction to be put on the "*Stockton and Darlington* Railway Act, 1855," 18 & 19 *Vict.* c. cxlix, and the "Lands Clauses," and "Railway Clauses" Acts, 1845, incorporated therewith. The *Stockton and Darlington* Act was passed to enable the Appellants to make new branches and other works, "to acquire additional lands, and for other purposes." By this Act it was recited that the proper plans, &c. had been deposited; and by the fourth clause it was enacted, that the Appellants might make and maintain the railways and other works by their original Act authorised, with all proper and necessary

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stations, approaches, and conveniences connected with the said railways, in the lines and upon the lands delineated on the plans and described in the books of reference, and according to the levels described in the sections deposited as aforesaid, and might enter upon, take and use all or any of the said lands which might be necessary for those purposes. And might also, subject as aforesaid, enter upon, take and use for the general purposes of their undertaking, and of those railways under lease to them, all or any of the following lands and property described on the plan and in the books of reference so deposited as aforesaid (that is to say), among other lands, land in the townships of *Ormesby* and *Normanby*, and parish of *Ormesby*, in the said *North Riding*, situated at *Cleveland Port*, and adjoining the *Middlesborough* and *Redcar Railway*, with the mill, engine-house, wharf, and other buildings standing thereon. The fifth clause provided, “that inasmuch as part of the lands in the township of *Ormesby*, which the company are by this Act authorised to take, are part of the estate of *John Brown*, a lunatic, and works and conveniences for the accommodation of that estate would be rendered necessary by the taking by the company of those lands, and the company are willing to make such works and afford such conveniences accordingly: therefore, if the company take those lands they may and shall make and afford such works and conveniences for the accommodation of that estate as, with the approval of the Court of Chancery, shall have been agreed on between the company and the committees of the estate of the said *John Brown*.”

While the Appellants' Act was in progress through Parliament, an agreement was drawn up for the purpose of finally settling the rights of the parties. One of the articles of this agreement (the 4th) was, that the Appel-

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lants should not be bound to perform any part of it unless the pending Bill should pass into a law, and this agreement should be confirmed in the Court of Chancery. This agreement was not executed either before the Act passed or before the time for the Appellants giving notice of the lands they intended to take would expire, and the notices were, therefore, formally and duly given. Mr. *Brown* was tenant in tail, in possession of the lands called the *Ormesby* estate, and Miss *Caroline Elizabeth Brown* was tenant in tail in remainder. As Mr. *Brown* had been declared a lunatic, and his person and estate had been put under the charge of committees, proceedings in lunacy were taken to obtain the consent of the *Lord Chancellor* in lunacy to the agreement.

Miss *Brown* appeared by counsel at the hearing in opposition to the confirmation of the agreement, on the grounds that it could not be specifically enforced against the Appellants, that the lands were not wanted for the *bonâ fide* purposes of the Company, and that the interests of the *Ormesby* estate were not sufficiently protected.

The Lords' Justices, sitting in lunacy, in *February* 1857, made an order permitting Miss *Brown* to institute, in the names of the committees, such suit as she might be advised. On the 5th of *March* 1857, she filed a bill stating the whole of the circumstances, and praying that the Appellants might be restrained by injunction from taking any part of the *Ormesby* estate, or putting in force the compulsory powers vested in them by their Act, or, at all events, restrained until a good and valid agreement respecting the works and conveniences necessary for the accommodation of the said estate should, with the approval of the Court of Chancery, have been come to. On the 29th *May* 1857 the Appellants put in their

answer asserting that the taking of the lands in question was necessary, proper, or convenient for the purposes of the railway, and denying suggestions in the bill that they required the lands for other purposes than those of the Act. Evidence was taken, and in *February* 1858, Vice-Chancellor *Wood* made a decree declaring the Appellants entitled under their Act to take the lands, but directed an inquiry as to what works and conveniences would be fit and proper to be made by the Appellants, having regard to the 5th section of their Act, and he dissolved an interlocutory injunction already granted against the Appellants taking possession of the lands, but directed that the Appellants should not act upon their motion for taking possession without the sanction of the Judge to whose court the cause was attached; and farther directions were reserved. This decree was carried before the Lords Justices, who, under the 15 & 16 *Vict.* c. 80, s. 42, and with the consent of both parties, called in Mr. *Hawkshaw*, an engineer, to assist them as to the matter in issue. The following were the instructions to the engineer: “Mr. *Hawkshaw* to inquire whether the whole or any, and if any, what part of the Plaintiff’s land on the north side of the railway is necessary, or, if not necessary, is proper and convenient to be taken by the company for any, and if any, what purposes or purpose of their undertaking; and if so, what works and conveniences for the accommodation of the estate will be rendered necessary, or if not rendered necessary, will be rendered proper, by the company taking such land. And in making such inquiries, the engineer is to have regard to the Plaintiff’s land on the south side of the railway included in the notice to treat; and the said engineer is to state the grounds and reasons on which his conclusions are founded.”

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Mr. *Hawkshaw*, on 10th *July* 1858, made his report, in the course of which he stated, "that it is not necessary that the company should take the whole of the Plaintiffs' land lying on the north side of the railway, because some of the purposes to which they propose to apply that land would be equally served by the Plaintiffs' land on the south side of the railway, an ample portion of which is included in the company's notice to treat.

"That it would be proper to allow the company to take (subject as herein mentioned), for the purpose of forming additional lines of way, sidings, platforms, and station accommodation, so much of the Plaintiffs' land lying on the north side of the railway, as is within a distance of forty yards from the centre of the double blue lines drawn along the middle of the *Middlesborough* and *Redcar* Railway upon the plan attached to the notice to treat."

Mr. *Hawkshaw* also reported, that leave ought to be reserved to the Respondent to build a bridge of a certain sort and at a certain level over part of the line of railway, should his land be taken by the Appellants. Evidence was taken in opposition to this report, and on the 20th *July* 1858, the Lords Justices made an order varying the decree of the *Vice-Chancellor*, and directing that the Appellants were not entitled to take the lands in the bill mentioned, except to the extent and upon the terms mentioned by Mr. *Hawkshaw*; and the Appellants declining to take any land on those terms, a perpetual injunction was awarded against them. This was the order appealed against.

Mr. *R. Palmer* and Mr. *Greene* (Mr. *Faber* was with them), for the Appellants:

Unless there is strong ground to presume *mala fides*,

the Court will not interfere with the exercise of such a power as this Act grants to the Appellants. There is no pretence for alleging *mala fides* here. Though it is clear that companies may not avail themselves of their Parliamentary powers to take lands which they do not require for the purposes of the railway, *Webb v. The Manchester, &c., Company* (a), yet the same case decides, that if afterwards such lands become necessary for the *bonâ fide* purposes of the company, the Court will not interfere to prevent their being taken. Here they were required from the first, and every day increasing the traffic and the need for accommodation increases the necessity for taking them. What is necessary is a matter to be determined by the *bonâ fide* decision of the company and its engineers. The word "necessary" was declared by Lord *Langdale* in *Sanderson v. The Cocker-mouth Railway Company* (b) to require in cases like the present, not a strict, but a reasonable interpretation. The Lords Justices, therefore, put a wrong construction on the Act, for the power given to the Appellants is not conditional. The powers given in the fifth section does not make the consent of the Committee material. There is no need for an appeal to the Court to give power to take the land; that power is given by the legislature; the court has only to approve of the terms. Subject to that approval, the observation of the *Vice-Chancellor* in *Sants v. The Birmingham and Wolverhampton Railway Company* (c), is applicable, that when a power to take lands is given to a company, the company has the right to take them in the most beneficial mode for the making

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(a) 4 Myl. & Cr. 116.

(c) 7 Hare, 251, 254.

(b) 7 Rail. Cas. 613.

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of the railway. The discretion is vested in the company by the legislature, and it cannot be interfered with by the court if it is exercised in good faith.

The Attorney-General (Sir *R. Bethell*) and Mr. *Rolt* (Mr. *Rowcliffe* was with them), for the Respondent :

First, this is not a *bonâ fide* taking of the land for the purposes of the railway. Secondly, the 5th clause of the Act is a condition precedent, and therefore the land cannot be taken without the consent of the committees, and the approval of the Court of Chancery. The company by that clause is not at liberty to purchase the lands until there has been an agreement as to the works and conveniences, the existence and nature of which agreement are essential elements in the price to be given. Thirdly, the report of Mr. *Hawkshaw* is the only ground on which the approval of the Court can properly be based ; and as the Appellants refused to take the lands on the terms stated in that report, they are not entitled to take the lands at all. [Frequent references were made to the evidence, to show that there was no necessity to take the land in question, and that Mr. *Hawkshaw's* conditions were those alone which would secure a just compensation to the owners of the *Ormesby* estate.] In the true construction of the Act, certain works and conveniences required for the accommodation of the estate are required to be approved of by the "Court of Chancery," that is, by the *Lord Chancellor* or Lords Justices sitting in lunacy before the company is entitled to take the land. That approval was refused here. Though *Hawkshaw's* aid was required by the Lords Justices, yet he being in fact appointed with the consent of both parties, both are

bound by his report, and no evidence against it ought to have been admitted. The 4th clause of the Act requires the lands taken to be those which are necessary for the works. Unless the Court is satisfied that they are necessary, they cannot be taken. The 5th section requires that the works for the accommodation of this estate, are to be made with the approval of the Court, which shows that the agreement must, in the first instance, be before the Court, whose opinion would override the approval or disapproval of the committees. If this is so, the Court of Chancery itself cannot relieve either of the parties from the necessity of producing the agreement, or proposed agreement, for its consideration and approval, and till that approval is given nothing can be done.

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Mr. Palmer, in reply :

The Court is not bound by the report of the expert, and it never was intended by the legislature that the Court should determine what was the exact amount of land required by the Appellants to execute their works. No *mala fides* is proved here, and that being so, the Appellants have a right to exercise their discretion within the limits of the Act.

The Lord Chancellor (*Lord Campbell*):

My Lords, after hearing this case very fully argued, 24 July. and having considered the pleadings, the evidence, and all the proceedings between the parties, I come to the conclusion that the decree of the Lords Justices of 20th July 1858, ought to be reversed.

[His Lordship stated the case, and the acts which gave the Appellants the power to make and maintain the railways.] I think that a mistake has been committed in re-

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quiring the Appellants to consent to the arrangements and the terms specified in Mr. *Hawkshaw's* Report. All the land thus claimed is asserted to be necessary for these purposes, and competent witnesses swear that it is necessary. Mr. *Hawkshaw*, the expert appointed by the Lords Justices, is of a different opinion. If it had been proved that the company was acting *malâ fide*, and trying under the powers of the Act of Parliament to get possession of lands of *Brown*, which were to be applied to other and different purposes, I think the Court would have been justified in interfering by injunction; but of this charge against the Appellants I can find no sufficient evidence; and while acting *bonâ fide*, they must be considered as the proper judges of the portion of land that is required for purposes which are legitimate. Although they would not be justified in engaging in any new trade as wharfingers, the access to the River *Tees* from the adjoining railway station might surely be very advantageous to the railway concern, considering the recent discovery of ironstone in the neighbouring regions. The Lords Justices have adopted or concurred in the Report of the expert, but I do not think that the opinion either of the expert or of the Court could curtail the power of the Appellants with respect to the quantity of land which they *bonâ fide* seek to obtain.

Again, I think that some of the terms mentioned in *Hawkshaw's* report, are not justified by the obligation cast upon the Appellants "to make and afford works and conveniences for the accommodation of the *Ormesby* estate." The bridge and other parts of the required works, as delineated on the plan, would, as it seems to me, deprive the Appellants of the fair use of that part of the land which is offered to them.

My difficulty is, as to what farther order we should

make, regard being had to the 5th section of the Act of Parliament. I heartily agree with the observation which fell from my noble and learned friend Lord *Brougham*, at the conclusion of the argument, severely censuring the hasty introduction of such clauses into such Acts of Parliament by way of compromise; the parties themselves having no definite notion of the construction to be put upon the language which they employ. According to one construction of this 5th section, there ought to have been an agreement between the Appellants and the committees of the Lunatic's estate, approved by the Court of Chancery before the Appellants could take any part of the lands. But I think the meaning of the parties may reasonably be considered to have been, that after the Appellants had elected to take so much of the lands as should be necessary for the purposes specified in the Act, and this had been duly ascertained, they might "make such works and afford such conveniences for the accommodation of that estate as with the approval of the Court of Chancery shall be agreed on between the company and the committees of the estate;" and if the parties cannot agree, then that the Court of Chancery shall determine what these works and accommodations should be. If this be so, the decree of the *Vice-Chancellor* may be affirmed as pronounced; and the inquiries which he directed being proceeded with, complete justice may be done to all concerned.

I must, therefore, advise your Lordships to take this course in the judgment you are about to pronounce.

Lord *Cranworth*:

My Lords, in this case conflicting views have been taken of the subject by Vice-Chancellor *Wood*, and by the

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Lords Justices, and it is impossible to deny that considerable difficulty exists.

Some general propositions admit of no doubt. In the first place, I think it clear that when the legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands: provided only that they take them *bonâ fide* with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers.

This principle, founded in good sense, has been sanctioned by authority in more than one decided case. Indeed the doctrine was hardly controverted, but it was said that in the present case the object of the Appellants in endeavouring to get the land of the Respondent situate on the north of their line, was not to promote their interests as owners of the *Stockton and Darlington* Railway; not to facilitate or increase the traffic on the line of which they are lessees; but to confer certain benefits on some of their influential shareholders, who are owners of extensive mineral and other property in the

neighbourhood. If this had been made out as a matter of fact, there would, independently of any special provisions in the Act, have been solid ground why the Court of Chancery should interfere to prevent the Company from taking the land. The Appellants would then be endeavouring to put into operation their statutable powers for purposes for which it was not intended that they should be exercised. But the Respondent has failed to convince me that there was any such indirect or collateral object.

That the Appellants really required a large part of the land to the north of their line is not disputed. Mr. *Hawkshaw* reported that it would be proper to allow them to take so much of the land to the north of the railway, as is within forty yards from the centre of the rails. The whole distance from that centre to the northern extremity of the land proposed to be taken, appears, according to the scale of the plans, to be about one hundred yards, and I see nothing in the evidence to lead me to think that the Appellants are not *bonâ fide* desirous to get the additional sixty yards for the legitimate purposes of the undertaking. That additional land would give them, among other benefits, the advantage of a wharf on the river *Tees*; they would not be at liberty to employ their funds in engaging in the business of wharfingers, but a wharf might be a very useful appendage to them as carriers; it would afford accommodation to persons desirous of sending ironstone or other goods by the railway across the *Tees* at *Cleveland Port*, or of sending goods from the north of the *Tees* to reach the railway at the *Cleveland Port* station. Whether these possible advantages would be sufficient to compensate to the Appellants the outlay they would have to make, including the purchase money for the land, is a matter

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which, independently of any special provision in the Act, they alone would have to determine.

The Appellants say farther, that they desire the land for the purpose of erecting on it workmen's houses, depôts, and other buildings. In answer to this it is said that all these buildings may be erected at least as well on the south as on the north of the line, perhaps even more conveniently. But this is not, as I conceive, a matter on which any one has a right to speculate. The Legislature has authorized the Appellants to take the land as well on the north as on the south of the line, and they are the persons (in the absence of special provisions) to decide what land they will take.

On these grounds I am of opinion that, if the question turned solely on the fourth section, the Appellants would, on the facts in proof in this cause, clearly be at liberty to take all the lands in their notice to treat. It is hardly necessary to say, that in estimating the sum to be paid for that land, the inconvenience which the owner of the lands to the south must experience by being cut off from the river, would form an important element of calculation.

I have thought it useful to explain what would have been my views if the case had turned solely on the fourth section; but the real difficulty arises from the special provisions of the fifth section, which is as follows: [His Lordship read it, see *ante*, 246.]

The clause, it will be seen, does not limit or control the right of the Appellants to take any land which, by the Act, they are authorised to take, but enacts that, in the event of the statutable power being exercised, the Appellants shall make such works and afford such conveniences for the accommodation of the lunatic's estate as *shall have been agreed on*, i. e., *as shall have previously been agreed on* between the Appellants and the committees of

the lunatic's estate, with the approval of the Court of Chancery. The difficulty is to say how this clause is to be acted on. By the preceding section the Appellants are authorised to take certain of the lunatic's lands ; by this fifth section it is enacted, that if they do take those lands, they shall afford certain accommodation to the lunatic's estate which shall have been *previously* agreed upon between them and those who are acting for the lunatic. It seems necessarily to follow, from this enactment, that the Appellants must have some means of compelling the committees of the lunatic to enter into an agreement as to what the accommodation shall be. The legislature could not have meant that the committees should have the power of preventing the Appellants from exercising their statutable power by simply refusing to agree as to the accommodation works to be afforded.

I know of no mode of solving this difficulty except by understanding the clause as obliging the committees and the Appellants to enter into such an agreement as should be reasonable. The agreement on the part of the committees must necessarily have the sanction of the *Lord Chancellor* or the Lords Justices, as protectors of the interests of the lunatic ; and the necessity of such a sanction was probably considered to afford a fair guarantee not only that nothing could be done on the part of the Appellants encroaching on the just rights of the lunatic, but also that no unreasonable claim would be set up on his behalf. If, indeed, the Appellants should consider that unreasonable terms are insisted on by the committees, under the sanction of the *Lord Chancellor* or the Lords Justices, then the Court of Chancery must be open to them on a bill filed to have it declared what terms are proper, *i.e.*, what are the works and accommodations which they are bound to make. This seems to me to be a necessary consequence of the interpretation I put on

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the fifth clause, namely, that before the Company exercises its statutable power it should make a reasonable arrangement with the committees of the lunatic as to the accommodation to be afforded to his estate.

I do not think it necessary to decide whether the words “the Court of Chancery,” in the fifth section, are to be taken as was assumed in the argument, to be only an inaccurate mode of designating the *Lord Chancellor* or Lords Justices sitting in lunacy, or whether they are to be understood in their ordinary sense. The difficulty of this latter construction is, that if the words are so construed, there must inevitably be a suit in Chancery if the Appellants take any of the lunatic’s land ; a consequence which the legislature could hardly have had in view. But whichever construction is adopted, a suit would certainly be necessary if the parties did not concur in the requisite agreement ; and that was what, in fact, happened, and a suit has therefore been instituted.

Taking this, then, as the true construction of the Act, I cannot think that the decree of the Lords Justices, now under appeal, was warranted. Their Lordships acted on the principle that they might decide, not what works would become necessary or proper for the protection of the lunatic’s estate, in consequence of all his land to the north of the railway having been taken by the Appellants ; but whether they required more than a part of that land, whether their objects would not be adequately obtained by taking a smaller portion of the lands on the north, and a larger portion of those on the south of the line. I confess that I think this was an interference with the discretion of the Appellants not warranted by the Act.

The decree pronounced by Vice-Chancellor *Wood* appears to me to have adequately protected the interests of all parties ; it left the Appellants at liberty to exercise their power by taking the whole of the land which they

deemed it for their interest to take, and, at the same time, prevented any practical steps being taken till it had been ascertained what works and accommodations ought to be made and afforded for the convenience of the lunatic, which were rendered necessary or proper by his being deprived of the land taken from him.

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When that has been ascertained, the Court will take care that the lunatic is not deprived of any of his lands without being previously or concurrently secured by the proper works and accommodations.

My opinion, therefore, is, that the decree of the Lords Justices should be reversed, and that of Vice-Chancellor *Wood* affirmed.

Lord *Brougham* concurred.

Lord *Kingsdown* :

My Lords, it is impossible not to feel that great difficulty has been created in this case by the circumstance that the Act of Parliament proceeds upon an assumption that an agreement will be come to, which in truth never has been come to; and we are, therefore, now compelled to deal with a case for which the Act has not in terms provided. I confess that I have felt considerable doubt about the case; but, after the best consideration I have been able to give to it, I concur with my noble and learned friends who have already expressed their opinion, that the judgment of Vice-Chancellor *Wood* is the sounder judgment, and ought to be affirmed by this House.

After a discussion on the question whether the cause should be remitted specially to the Lords Justices, the following Order was made:—

That the decree of the Lords Justices of the 20th of *July* 1858, be reversed, and that the decree or decretal

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order of the Vice-Chancellor, Sir *William Page Wood*, of the 19th of *February* 1858, be affirmed; and it is farther ordered, that the cause, including the motion of the Plaintiffs to vary the certificate of the 31st *March* 1858, mentioned in the appeal, be remitted back to the Vice-Chancellor, Sir *William Page Wood*, in the Court of Chancery, to take up and proceed with the same in the state in which the said cause was when the same was brought by appeal before the Lords Justices, and to do therein as shall be just and consistent with this judgment.

Lords' Journals, 24 *July* 1860.

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 ———
Deed.
Power.
Execution.
Attesting
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Issue to try.
Married
Woman.
Costs.

AUGUSTUS NEWTON and WIFE - - *Appellants.*

Sir CORNWALLIS RICKETTS, Bart., and }
 others - - - - - } *Respondents.*

Where the genuineness of handwriting to a deed is contested in Chancery, if an affidavit is produced from the sole attesting witness alive that he knew the persons executing the deed, and saw them execute it, and then wrote his own attestation, the fact that persons skilled in handwriting declare their belief, formed on inspection, that the handwriting is not genuine, does not call on that Court to grant an issue to try the disputed fact; but it may determine that fact on the opposing affidavits.

No memorandum of attestation to a deed, made in execution of a power, stating the observance of all the particulars required by the deed creating the power, is needed to establish that the power has been, as to the forms required, duly executed.

The case of *Burdett v. Spilsbury* (10 Clark & Fin. 340) confirmed.

For such a purpose, there is no distinction between the execution of a will under the Statute of Frauds and of a deed under a power.

A power authorised a deed to be made by two persons, "under their hands and seals, in the presence of, and attested by, two wit-

newa." The attestation of the deed exercising the power was in these words, "signed, sealed, and delivered in the presence of" two witnesses :

Held, that this was a sufficient attestation.

By a deed, made under a power of appointment, a sum of money was directed to be paid to a married woman for her sole use and benefit, and her receipt alone was to be a discharge. She mortgaged her interest in this money, and afterwards joined with her husband and the mortgagees in a litigation relating to the deed. The decision was adverse to them. The Order made this sum expressly liable to the costs :

Held, that the Order was right.

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By a settlement dated 14 *May* 1802, on occasion of the intended marriage of *Robert Tristram Ricketts*, esq., and Miss *Rebecca Gumbleton*, certain funds were settled in trust after the decease of the survivor, for the benefit of all the children of the marriage, in such proportions and in such manner and form as they, the said *R. T. Ricketts* and *Rebecca Gumbleton*, "by any deed or writing to be by them duly executed under their respective hands and seals, in the presence of, and to be attested by, two or more credible witnesses, shall direct and appoint." In default of appointment, or on a defective appointment, the funds were to go among the children of the marriage in equal shares, to be vested at 21 or marriage.

The marriage took place, and out of nine children seven attained the age of 21, the other two having died in infancy. The Appellant, *Mrs. Newton*, was the eldest daughter of the marriage. *Mr. Ricketts* became a Vice-Admiral of the Blue, and in 1827 was created a baronet. On the 6th *August* 1840, he and his wife executed a deed, which recited their desire to exercise the power given them by the marriage settlement, and witnessed that in exercise thereof they did "by the present writing under their respective hands and seals, in the presence of two

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credible witnesses, whose names are intended to be hereafter endorsed as witnesses attesting the signing, sealing, and delivery of these presents by them, the said Sir *R. T. R.* and Dame *Rebecca* his wife, direct and appoint, &c.," that on the death of the survivor of them, the trustees should raise the sum of 100 *l.*, and pay the said sum of 100 *l.* into the hands of the said *Lætitia Frances Henry Newton*, for her sole and separate use and benefit, independently of her husband, for which her receipt alone shall be a sufficient and effectual discharge, the same to be as and in full of her share in the said settled trust monies, and premises," &c., the residue to be equally divided among the other children. The execution of this deed of appointment was in the following form:—"In witness whereof the said Sir *Tristram Robert Ricketts*, otherwise Sir *Robert Tristram Ricketts*, and Dame *Rebecca* his wife, have hereunto set their hands and seals, the 6th day of *August*, in the year of our Lord 1840. *T. R. Ricketts*, otherwise *Robt. T. Ricketts* (L.S.); *R. Ricketts* (L.S.). Signed, sealed, and delivered in the presence of *Geo. Buckman*, *E. Cossens*, Clerks to Mr. *Straford*, Solicitor, *Cheltenham*."

After the death of Lady *Ricketts* in 1859, the fund appointed being in court, a petition was presented to the Court of Chancery to direct the payment over of the sum of 100 *l.*, with 4 *l.* as one year's interest thereon, to Mrs. *Newton*, and then a division of the rest of the property appointed among the other children. This petition was opposed by Mr. and Mrs. *Newton*, who disputed the deed of appointment, insisting, first, that it was not validly executed and attested in point of form; and next, that the handwriting of the name of Sir *R. T. Ricketts* was not the genuine signature of that gentleman. Certain mortgagees of the fund belonging to Mrs. *Newton*

were parties to the proceedings. Evidence by affidavits was taken. *Buckman* was dead; *Cossens*, the other attesting witness, swore positively to the due execution of the deed by Sir *T.* and Lady *Ricketts*, whom he well knew. Their signatures were impeached by evidence on comparison of handwriting. The *Vice-Chancellor* decided that the deed had been validly executed (*a*), and made an order one of the directions of which rendered the 104 *l.* liable for the costs. This was the order appealed against.

Mr. *Newton*, in person, contended, first, that the execution of the deed of appointment was not properly or sufficiently attested pursuant to the terms of the power in the settlement, for attestation must express the fact, be it signing, sealing, or delivering, which is required to be attested. Secondly, that no affidavit could be read, nor any extrinsic evidence admitted, to supply the proof of any fact required to be specified in the attestation. Thirdly, that as the genuineness of the handwriting was contested there ought to have been a trial on oral testimony before the *Vice-Chancellor*, or before a jury on an issue. Fourthly, that there ought to have been a trial as to the fact, whether the deed was not executed under a misconception; and, fifthly, that to decide without a trial was not according to the practice of equity. The following cases and authorities were cited: *Newton v. Askew* (*b*), *Wright v. Wakeford* (*c*), *Sugden on Powers* (*d*), *Preston on Abstracts* (*e*), *Burdett v. Spilsbury* (*f*), *Moodie v. Reid* (*g*).

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Mr. *Willcock* and Mr. *Williamson*, for the Respondents, were not called on.

- (*a*) *Nom. Re Ricketts' Trusts*,
1 *Joh. & Hem.* 70.
- (*b*) 11 *Beav.* 145.
- (*c*) 17 *Ves.* 454; 4 *Taunt.* 218.
- (*d*) 8 *edit. c.* 7, ss. 4-9.

- (*e*) Vol. 1, p. 285.
- (*f*) 4 *Ad. & El.* 1; 1 *Har. &*
Wol. 591; 6 *Nev. & Man.* 259;
- 10 *Clark & Fin.* 340.
- (*g*) 7 *Taunt.* 355.

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The Lord Chancellor (Lord *Campbell*):

My Lords, this case has been very ably argued by the Appellant in person, but he has not raised in my mind any doubt as to the soundness of the judgment pronounced by the *Vice-Chancellor*.

The first ground of appeal is, that the *Vice-Chancellor* decided without granting an issue as to whether the execution of the deed was in the handwriting of the donee of the power. Upon the evidence before him, I am of opinion that he came to a just conclusion that such an inquiry was totally unnecessary. There was the clear and distinct evidence of the surviving witness, who was not cross-examined, as he might have been, and who swears that he and the other attesting witness “were respectively present, and saw Sir *Tristram Robert Ricketts* and Dame *Rebecca Ricketts* his wife, both of whom they well knew, severally and respectively sign and seal, and as their respective acts and deeds deliver, the said parchment writing or deed poll of appointment.” That evidence being unimpeached, was it a ground for directing an issue that certain persons, looking at the handwriting of the signature, intimated their opinion, which they might sincerely entertain, that it was not the character of Sir *Robert Ricketts*’s handwriting? That could be no counterbalance to the direct evidence of the attesting witness, and, under all the circumstances of the case, it would have been very indiscreet to grant such an issue.

The great question here is, as to whether this deed was properly executed. Upon that point, after the decision of this House in *Burdett v. Spilsbury* (*h*), I really have no doubt. Before that decision it might have been con-

(*h*) 10 Clark & Fin. 340.

tended that a memorandum of attestation was necessary, and that if it did not state the observance of all the particulars required by the deed creating the power, the execution would be defective. But since that case the law must be taken to be settled that, if *de facto*, the power was properly executed, and the witnesses saw that it was so executed, and they have simply signed their names as witnesses, no memorandum of attestation is necessary. I consider that that was the *ratio decidendi* in that case; for although a distinction has been taken for certain purposes, between the execution of a will under the Statute of Frauds and under a power, I apprehend that for this purpose no distinction is to be made.

Here, in the creation of the power, it is said that the appointment is to be made by Sir *Robert* and Lady *Ricketts* by deed, “by them duly executed under their respective hands and seals, in the presence of and to be attested by two or more credible witnesses.” All turns upon the legal construction of the word “attested.” In fact, this deed was executed by Sir *Robert Ricketts* and by Lady *Ricketts* in the presence of two witnesses. It was signed by them in the presence of the two witnesses as their act and deed, the witnesses being *George Buckman* and *E. Cossens*.

Then the question is, as to the form of the attestation. It is admitted that the form used would have been sufficient if the additional words had been inserted, “by each of the parties to this deed—Sir *Robert Ricketts* and Lady *Ricketts*—in the presence of us.”

If there had been no attesting clause at all—if there had been nothing but the signature of the witnesses—if the deed had been executed according to the provisions of the power, there could have been no difficulty. Then, is the execution to be vitiated by what is here stated in

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the attesting clause? I think that if an attesting clause was necessary, which, after the decision in *Burdett v. Spilsbury*, I say is unnecessary; but if it had been necessary, this would be sufficient, because I think that, according to the plain and clear import of the words, the inference is, that the two witnesses saw each and both of the parties to the deed sign, seal, and deliver it.

I consider it unnecessary to express any opinion, at considerable length, upon this subject. After the case of *Burdett v. Spilsbury*, I do not think it necessary now to go back to *Wright v. Wakeford*, or any of that class of cases which were then brought before your Lordships.

For these reasons, it seems to me that the decision of the *Vice-Chancellor*, as to the validity of the attestation, was perfectly sound, and that there is no ground for this appeal. I must, therefore, advise your Lordships to affirm the decree, and dismiss the appeal.

Lord *Cranworth* :

My Lords, I have very little indeed to add to what my noble and learned friend has said. With regard to the only real point, that is, the validity of the deed with reference to the supposed imperfect attestation, I will only just put it thus: Suppose that there had been no "signed, sealed, and delivered in the presence of" such and such witnesses, but it had been simply that the witnesses had signed their names; that would certainly have been sufficient according to the decision of this House in *Burdett v. Spilsbury*. Then can it possibly be otherwise, because here it is stated what was done, namely, that it was so "signed, sealed, and delivered"? That can make no difference. It is not like the case of *Wright v. Wakeford*, where the expression was, "sealed and delivered in the presence of" without saying "signed." That was held

to be in the nature of *expressio unius exclusio alterius*. You cannot apply such a doctrine here, because when you have “signed, sealed, and delivered” of what is that the *expressio*, or of what is it the *exclusio*? It is impossible to predicate either that it expresses anything, or that it excludes anything, except that it was signed, sealed, and delivered in the presence of those persons. *Primâ facie*, when witnesses attest a deed, they mean to attest that it was signed, sealed, and delivered in their presence by the persons who executed it. Certainly, as the *Vice-Chancellor* observed, it is competent to either side to say that although you see those signatures here, in point of fact it was not signed by these parties in the presence of these witnesses. That is what the *Vice-Chancellor* meant when he spoke of the necessity of parol evidence. But here the whole of the evidence excludes anything of that sort, because that it was signed, sealed, and delivered in the presence of those witnesses, is put beyond all possibility of doubt.

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With regard to the only other question of the supposed forgery of Sir *Robert Ricketts*' name, where one of the attesting witnesses positively swears that Sir *Robert Ricketts* and Lady *Ricketts* signed, sealed, and delivered this deed in his presence, and in the presence of the other witness, I think that the *Vice-Chancellor* would have been grossly neglecting his duty if he had put the Respondents (especially when the Appellants did not choose to cross-examine the witness upon the subject) to the expense and delay of a trial at law, to establish a fact about which there could be no doubt.

I concur, therefore, with my noble and learned friend, that there is no ground whatever for this appeal.

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Lord *Chelmsford* :

My Lords, I agree with my two noble and learned friends upon the questions which have been raised upon this appeal. In the first place it is said by the Appellant that the *Vice-Chancellor* ought to have directed an oral examination, either before himself or before a jury, upon the subject of the execution of this deed of appointment under the power. It seemed to be insisted on the part of the Appellant, that there was a claim of right to have an inquiry of this description, under the Act of 1858, whereas under that Act it is entirely discretionary with the Judge in Equity to decide whether such an inquiry shall be instituted or not. If that discretion had been unreasonably exercised, this House might, possibly, interfere; but where it is clear that there has been a due exercise of discretion, there can be no ground for appeal against the exercise of that judgment. Now what are the grounds upon which it was insisted that there ought to have been this oral examination of witnesses? [His Lordship here went into a full examination of the facts of the case, and expressed as to them his complete concurrence with the *Vice-Chancellor*.]


The only remaining question is with regard to the sufficiency of the attestation of the execution of this deed of appointment. Now, I really have very little to add to what has been stated on that subject by my two noble and learned friends who have preceded me. The only objection to the form of attestation (because it is a formal objection) is, that it does not expressly say that the witnesses saw that deed executed, that is, "signed, sealed, and delivered," as they express it, by each and both of the parties to the deed.

It was pressed, on the part of the Appellant, that there

was an analogy between this case and the case of a joint affidavit, in which it is required by the Courts that the jurat should express that the affidavit was sworn by both the deponents. My Lords, the object of that is to satisfy the Courts; it is a rule which is laid down by the Courts, that they will not receive an affidavit made by more than one party, unless it is quite clear that the affidavit has been sworn by both the deponents; but that can have no bearing whatever, and no analogy to a case of this kind, in which there is proof upon the face of the deed of everything having been done which is requisite to be done, namely, the signing and sealing, which is the execution of the deed, and all that is required is the attestation of the witnesses to the due execution of the deed in that respect by the parties.

I agree entirely in what has been said by my two noble and learned friends, that it would have been sufficient here if they had merely signed their names as witnesses, without anything more. It cannot be a bad attestation, because they have gone farther, and have proved that everything that was necessary to be done by the parties in order to make a valid execution of the power, namely, signing, sealing, and delivering, was, in point of fact, done in their presence. If common sense is applied to the question, there can be no difficulty whatever in the case; nor do I find that any difficulty is introduced by any of the authorities that have been cited upon the subject, because they are all of them distinguishable from the present case, and it is admitted by Mr. *Newton* that he cannot produce any authority whatever for saying that an attestation of this kind in execution of a power of appointment, was ever held to be bad.

Under these circumstances, I think that the order of

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the *Vice-Chancellor* was perfectly correct, and must be affirmed.

Mr. *Newton* then referred to an objection to the form of the order made by the *Vice-Chancellor*, directing the sum of 104 *l.*, payable to Mrs. *Newton*, to be made liable for the costs, and contended that there was no power to apply to the costs of this cause the sum of 100 *l.*, which was directed by the deed of appointment itself to be paid "to the sole and separate use of Mrs. *Newton*."

The *Lord Chancellor*: By whom is the petition presented to the *Lord Chancellor*?

Mr. *Newton*: The petition is that of Sir *Cornwallis Ricketts* and Mrs. *Newton*'s brothers and sisters under the Trustee Act. Then we are served with that petition, and we go in and oppose the application for the distribution of the fund. That question is now decided against us, and I am not here to say for a moment that the order of costs in the Court below as regards myself was wrong, but as regards Mrs. *Newton* I submit that it was wrong, because the deed of appointment expressly directs the money to be paid to her separate and sole use. In the case of *Newton v. Askew* (i) in which there was judgment against me in the hands of the same parties who are opposing us here, or their solicitors, Mr. Justice *Cresswell* had made an order charging the fund in Court recovered in that suit and ordered to be paid to Mrs. *Newton*; and upon an application to the *Master of the Rolls* to carry out that judgment, to the amount of about 300 *l.*, against the fund which he had decreed to be paid to the sole receipt of Mrs. *Newton*, his Honour decided that he had no power to do it, and he dismissed the application with costs.

(i) 11 Beav. 145.

The *Lord Chancellor*: The proceeding there was totally different. That case has no bearing upon it.

Mr. *Willcock*: There is no ground whatever for this application. The position of the fund is this: after the death of Lady *Ricketts*, and therefore after the money became payable to Mrs. *Newton*, she mortgaged all her interest under that appointment, to different persons, which certainly she had full power to do. These mortgagees, together with Mr. and Mrs. *Newton*, appeared respectively as parties in the Court below, and this order was made.

Lord *Cranworth*: Then that sum of 100*l.* is made available for those costs, not in respect of the relation of Mrs. *Newton* to her husband, but in respect that the mortgagees are ordered to pay?

Mr. *Willcock*: There was no order that the costs should be paid by Mrs. *Newton*, but the order was that the costs should be paid out of the fund.

Mr. *Newton*: The order is upon me to pay the costs; I speak for myself.

Lord *Cranworth*: It is perfectly obvious what the case is; the mortgagees were to pay the costs. The *Vice-Chancellor's* order was quite right.

The *Lord Chancellor*: The appeal must be dismissed with costs.

Order appealed against affirmed, and appeal dismissed with costs.

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July 7, 8.

BENJAMIN S. BEAMISH - *Plaintiff in Error.*HENRY ALBERT BEAMISH - *Defendant in Error.*

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July 2, 3.

It being settled by the decision in *The Queen v. Millis*, that to constitute a valid marriage by the common law of *England*, it must have been celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid.

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February 21.
April 22.

*Marriage by
Priest in his
own case.*

As to the manner in which a marriage is to be celebrated, the law does not admit of any difference between the marriage of a clergyman and of a layman.

Gools v. Hudson, and *Holmes v. Holmes*, commented on and explained. See *post*.

Per Lord *Campbell* (Lord Chancellor): A decision of this House, occasioned by the Lords being equally divided, is as binding upon this House itself and upon all inferior courts, as if it had been pronounced *nemine dissentiente*. (See *The Attorney-General v. The Dean of Windsor*, ante Vol. 8, p. 369.)

Semble, that the decision in *The Queen v. Millis* is not to be applied to a case where the presence of a minister in holy orders is impossible.

DOCTOR SAMUEL JOHN BEAMISH was entitled to certain estates in the county of *Cork*. He had several sons, of whom the Rev. *Samuel Swayne Beamish* was the first, and *Benjamin S. Beamish*, the present Plaintiff in Error, the second. The Rev. *S. S. Beamish*, in the year 1831, became attached to a young lady named *Isabella Frazer* (both being members of the united church of *England* and *Ireland*), and as he did not obtain his father's consent to his marriage with her, he persuaded her into a clandestine marriage, which, according to the special verdict found in this case, was performed in the following manner:—"On the 27th *November* 1831, the Rev. *Samuel Swayne Beamish*, being then a clergyman in holy orders, went to the house of one *Anne Lewis*, in the city of *Cork*, and there performed a ceremony of marriage between himself and *Isabella Frazer*, by read-

ing between them, in a room in said house, the form of solemnization of matrimony used in said united church of *England* and *Ireland*, as set forth in the Book of Common Prayer, and Administration of the Sacraments and other rites and ceremonies of said united church, by declaring that he, the said Rev. S. S. *Beamish*, then took her, the said *Isabella Frazer*, to be his wedded wife, and by receiving the declaration of the said *Isabella Frazer*, which she then and there made, that she took him the said Rev. S. S. *Beamish*, to be her wedded husband, and by the said Rev. S. S. *Beamish* placing a ring on the finger of the said *Isabella Frazer*, and by his pronouncing the blessing in said form appointed, &c. That there was not any clergyman of holy orders present at the performance of the said ceremony of marriage, save and except the Rev. S. S. *Beamish* himself; and there was not any person present in the room where same was performed, save the Rev. S. S. *Beamish* and *Isabella Frazer*, but that the performance thereof was seen by one *Catherine Coffey*, who privily, and without the knowledge or sanction of the said Rev. S. S. *Beamish* and *Isabella Frazer*, or either of them, saw the said ceremony performed as aforesaid from a yard adjoining said room, but did not hear what passed between the said parties." *Henry Albert Beamish* is the eldest son of this marriage; his father, the Rev. S. S. *Beamish*, died intestate in 1844. Doctor *Samuel Beamish* did not die till eight years afterwards, namely, in 1852, and on his death, *Henry Albert Beamish* claimed, as the eldest son of the Doctor's eldest son, to enter into possession of the estates. This claim was contested by *Benjamin Swayne Beamish*, the Doctor's second son, on the ground that there had not been any valid marriage between the Rev. S. S. *Beamish* and *Isabella Frazer*. Proceedings were taken in the Court

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of Chancery in *Ireland*, by *H. A. Beamish*, to enforce his claim. By an order of that Court, dated 20 *July* 1854, the proceedings were ordered to stand over, with liberty to him to bring an action of ejectment against *Benjamin S. Beamish*, who was made Defendant therein. This action was brought, and was tried at the *Cork* summer assizes in 1855, before *Henry Martley*, esq., Q. C., when the special verdict already set forth was found. The Court of Queen's Bench in *Ireland* gave judgment on this verdict for the Plaintiff, *H. A. Beamish*. Error was brought in the Exchequer Chamber, where the Judges were divided in opinion; but, by a majority, the judgment of the Court below was affirmed (*a*). The case was then brought up to this House (*b*).

The Judges were summoned, and Mr. Justice *Willes*, Mr. Baron *Watson*, and Justices *Byles* and *Hill* attended in the year 1859. Before the hearing in *July* 1860, Mr. Baron *Watson* died; and that hearing took place in the presence of Justices *Willes*, *Byles*, and *Hill*.

Sir *F. Kelly* and Mr. *Chatterton* (of the *Irish Bar*),
 for the Appellant:

The authority of *The Queen v. Millis* (*c*) is assumed to be binding. The presence of a priest is, therefore, necessary to the validity of a marriage. But it cannot be

(*a*) 6 Ir. Law Rep., N.S., 142.

(*b*) The General Marriage Act for *Ireland* was not passed till *August* 1844, 7 & *Vict.* c. 81. The question in this case was therefore considered with relation to the requirements of the law of *England* as it stood before the *English Marriage Act*, 26 *Geo.* 2, c. 33. The very full and exhaustive opinion delivered by Mr. Justice *Willes*, and the judgments of the Lords who took part in deciding the case, have rendered it unnecessary to do more than indicate the course of the arguments.

(*c*) 10 Clark & Fin. 534.

valid when performed by the priest himself in his own case, and without any other priest being present. The 2 & 3 *Ed. 6*, c. 21, permitted the marriage of priests, but this was to be after asking in the church, and according to the order prescribed in the Book of Common Prayer. That in fact, made the ceremonial in the Prayer Book part of the statute. This was recognised and enforced by 5 & 6 *Ed. 6*, c. 12, s. 3. It is clear, therefore, that the coming into the church, the man standing on the right hand and the woman on the left, and being there asked, was a substantive part of the ceremonial, and the priest asking as priest must be one person, and the priest, the bridegroom, must be another.

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There are three cases in which the minister or official has attempted to perform the marriage ceremony for himself. The first is *Goole v. Hudson* or *Boyce* (*d*) in the Arches Court, 1733, in which it appeared that the marriage ceremony was performed by the minister himself. The lady married again; a suit was instituted, and a decree pronounced, treating the previous act merely as a pre-contract, not as a marriage; and directing a marriage to be celebrated in the face of the church. The same occurred in *Portynton's* case (*e*); and the third was that of a case decided in *France* (*f*). The man there was mayor of the district, and he did for himself those acts which the law absolutely required to be done by the mayor, and he was held incapable of performing them for himself, and therefore what had been done was treated as void. The principle of that case exactly applies here.

(*d*) M.S. See *post*, where the case is stated by Mr. Justice *Willes*.

Clark & Fin. 841.

(*f*) *Nouvelles Causes Célèbres*, 23 June 1807.

(*e*) See this case stated 10

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[Lord *Chelmsford*: *Holmes v. Holmes* (*g*) is another instance.]

That principle is expressly adopted in the *United States*; *Bishop* on the Law of Marriage (*h*). And this was plainly according to the ancient canons (*i*). “At nuptials there shall be a mass priest present who shall by God’s blessing bind their union to all prosperity.” “Farther, it is ordained that no man do join his daughter in marriage without the priest’s benediction. Other marriage shall be deemed fornication.” This last phrase is much more than directory; it is final, and the penalty is the utter invalidity of the marriage. Again, “Let no faithful man of what degree soever marry in private, but in public, by receiving the priest’s benediction.” *Palmer, Origines Liturgicæ* (*j*) is to the same effect. In *Herbert v. Herbert* (*k*) the marriage, though irregular in some forms, was held valid, the parish priest having performed the ceremony. For a man to pretend to give a blessing to himself looks like an act of blasphemy, but it is clear that the priest must pronounce a blessing, and do other things which are essentially necessary to constitute a formal marriage; some of these things being impossible to be performed except by one person to another, the attempt by a person to perform them for himself makes the whole proceeding null.

The priest is a solemnly accredited functionary, invested with authority as the representative of the church, and importing into the ceremony the religious elements

(*g*) See post p. 300.

(*h*) Boston ed. 169.

(*i*) A.D. 940, 1076–1175. Ancient Laws and Institutions of England. See also Johnst. Ecc.

Law A.D., 943, s. 8; 1076, s. 5; 1175, s. 17.

(*j*) Ch. vii., Matrimony.

(*k*) 2 Hagg. Cons. Cas. 263, 269.

which the law requires; he is also the solemnly accredited witness to the acts of the parties. For these purposes the law requires him to be present, *Scobell's Ordinances* (l), the marriages under which were confirmed by statute (m). The *English Marriage Act*, 26 *Geo.* 2, c. 33, the 21 & 22 *Geo.* 3, c. 35, relating to *Ireland*, and the 5 *Geo.* 4, c. 68, relating to *Newfoundland*, contemplated, throughout, that the priest should be a person distinct from either of the parties. So do the 7 & 8 *Vict.* c. 56, relating to Dissenters' marriages, and 7 & 8 *Vict.* c. 81, the *General Marriage Act of Ireland*, and the 6 *Geo.* 4, c. 92, for validating marriages celebrated in any church or chapel erected since the passing of the statute of *Geo.* 2. Whether looking to *England* or the colonies, it is clear, as stated by Mr. *Burge* (n), that marriages, to be valid, must be performed by a minister. On the same principle, the *French* code, which admits of civil marriages, requires (o) the presence of the public officer. Public as well as private interests are protected by this precaution of requiring a clergyman to be a witness of the ceremony; and this was probably the reason for the penal declaration attached to the canon of 1076. In *Mant's* edition of the *Common Prayer Book* (p), Dean *Comber* is cited for the statement, that the priest's blessing is so comprehensive, "that it is sometimes called the blessing of God." That blessing is given after the parties are declared to be man and wife. Everything therefore shows that the church never contemplated, and never was deemed to contemplate, the possibility of the ceremony being performed except by a third person.

The rules of the common law in various matters show

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| (l) A.D. 1644, c. 51, p. 86. | <i>Laws</i> , vol. i. p. 161. |
| A.D. 1663, c. 6, p. 236. | (o) <i>Code Civil</i> , art. 165. |
| (m) 12 <i>Car.</i> 2, c. 33. | (p) <i>Oxf. Ed.</i> p. 454. |
| (n) <i>Comm. on Col. and For.</i> | |

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that a man may not, under such circumstances, perform the required act for himself. *Finch's Law* (*q*): and *Bacon's* case (*r*), where a recognizance given to three, and taken before one of the three, was held bad as to him. So a man may offer himself to a bishop for induction, but cannot present himself (*s*), nor can a cognizee of a fine take his own cognizance (*t*), nor a contracting party be his own agent, within the Statute of Frauds, *Farebrother v. Simmons* (*u*).

Dr. *Gayer* and Mr. *Isaac Butt* (both of the *Irish* bar) for the Respondent:

The cases of *Goole v. Hudson* (*v*), *Holmes v. Holmes* (*v*), and the *French* case (*w*), have no application here; they all depended on the insufficiency, not of the ceremony but of the evidence of the marriage; and the Court, in the first two, pronounced the only sentence it could, namely, that the marriage should be duly celebrated. In the *French* case, too, the real difficulty was, that the mayor was required, in his judicial capacity, to give a certificate, and it was held that he could not possibly assume the character of a judge in a case in which he was a party. The difference between a judicial and a merely ministerial duty is manifest.

The present was merely an irregular, but it was a completely valid marriage; and such marriages have only been forbidden in *Ireland* since the 7 & 8 *Vict.* c. 81, as

(*q*) p. 19, pl. 20.

(*r*) Dyer, 220 *b*.

(*s*) Burn, *Ecc. Law*, Benefice, Presentation, 16.

(*t*) West's *Symboleography*, Part 2, pl. 5, s. 17.

(*u*) 5 Barn. & Ald. 333. See *Darrell v. Evans*, 6 Hurl. & N.

602.

(*v*) M.S. See these cases full referred to in the Opinion of Mr. Justice *Willes*, and in the Judgment.

(*w*) *Nouvelles Causes Célèbres*, 23 June 1807.

they were forbidden in *England* by the 26 *Geo.* 2, c. 33. Till the statute of *Victoria* such marriages were frequent in *Ireland*, *Steadman v. Powell* (*x*), before Sir *J. Nicholl*, in 1822, recognised that fact, and so did *The King v. Failding* (*y*). In *Maxwell v. Maxwell* (*z*) an irregular and clandestine marriage, celebrated by a priest in holy orders, though he was of the sort commonly styled a "couple beggar," without any witness being present, the priest being dead at the time of the suit instituted, was declared valid. So in *Le Geyt v. O'Brien* (*a*), administration was granted on proof of celebration by a clergyman since deceased; and the learned judge, Dr. *Radcliff*, expressed some doubts as to whether the intervention of a priest was necessary, and he would not allow an inquiry whether the clergyman had duly received ordination, holding that the performance of the ceremony was the important point, and that, as it had been performed, it must be taken to have been performed by a competent person, and he held the marriage, though irregular, to have been legally constituted.

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It is no offence for a man to ask the blessing of God upon himself, and the ordinary form of benediction is, that of a request to God to bless the persons named; the priest never pretends to bestow the blessing, but only to ask it. That alone, therefore, can form no obstacle to a clergyman performing the ceremony for himself. Nor can any of the other forms prescribed by the Book of Common Prayer have that effect. Many of these forms were merely directory of the course to be pursued in the case of a regular marriage, but there was no penalty,

(*x*) 1 Addams, 58.

(*y*) 14 St. Tr., 8vo. 1327.

(*z*) Milw. Ecc. Rep. (Ir.) 280.

(*a*) Milw. Ecc. Rep. (Ir.) 325.

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and certainly none in the shape of avoiding the marriage, attached to the breach of any one of them. [They referred with considerable minuteness to the words of the articles in the Matrimonial Service.] Admitting that there are some cases in which a person cannot validly do acts in two characters, there are others in which he can do such acts. A trustee may execute a lease to himself and others, and a partner in one firm may draw a bill on another firm, of which he is likewise a member, and, as a member of that second firm, may bind it by his acceptance. A man may not do inconsistent acts in the same identical character, but he may do such acts where he fills two characters with reference to the same transaction. In the case of a female reigning sovereign, she may, on marriage, promise to obey as a wife, though she would be undoubtedly at the same moment sovereign to the man who became her husband.

Though a marriage may be so celebrated as to subject the parties celebrating it to ecclesiastical censure that will not avoid the marriage itself.

Some of the authorities are express to the point, that though matrimony is spoken of as a sacrament, it is one which may be administered to each other by the parties themselves, *De Burgh* (b); and *Walterius*, a professor of the canon law at *Bonn*, is to the same effect (c). The Council of *Trent* requires the priest to utter the words *Ego vos conjungo*, but the *English* ceremonial has no equivalent words in it. Indeed the words "what God has joined together" not what "I have joined together," show that the ceremony is one in which the priest does

(b) *Pupilla Oculi*, part 8, c. 1.
 See the whole passage quoted,
 10 Clark & Fin. 581.

(c) *Manual of Ecclesiastical*
Law, 8 ed. p. 579, par. 295, s. 4.
 See 10 Clark & Fin. 584.

not actually take part. Nor is there anything in that part of the church service which must necessarily be uttered by a third person.

[Lord *Wensleydale*: It is clear from the report of *Herbert v. Herbert* (*d*), that the priest there did not utter those words, and yet the marriage was held good according to the law of *Sicily*.]

Admitting, therefore, on the authority of *The Queen v. Millis*, that the presence of a priest is necessary as he has nothing to do which may not be done by one of the parties, his presence as one of the parties is sufficient. In *Harrod v. Harrod* (*e*) Vice-Chancellor *Wood* declared that no particular form of words was necessary to constitute a valid marriage under the old law of *England*. The marriage may be irregular because of the use of certain words instead of others, or the omission of certain forms, as for instance, the omission of giving the ring; but that would not in the least degree affect the validity of the marriage.

Here there is a valid civil contract made in a binding form in the presence of a priest, and that being so the marriage cannot now be impeached merely for want of regularity. Even in *The Queen v. Millis* (*f*), nothing was said as to what the character of the religious ceremony was to be. It required that a priest should be present, and that requisition has been complied with. The old *Saxon* law which first in terms declared that a mass-priest should be present, speaks only of his blessing the union to "all prosperity," such a blessing could surely without any impropriety be invoked by the priest himself on his own marriage. And *Herbert v. Herbert* (*g*), shewed distinctly that a marriage was recognised in this

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(*d*) 2 Hagg. Cons. Rep. 263.

(*f*) 10 Clark & Fin. 534.

(*e*) 18 Jur. 853. 1 Kay & J. 4.

(*g*) 2 Hagg. Cons. Rep. 263.

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country as valid, though the priest there appeared not to have taken any active part whatever in the ceremony.

Sir *F. Kelly* replied.

The Lord Chancellor (Lord *Campbell*), after thanking the counsel for the great assistance given to the House, moved that the following question be put to the Judges Agreed to.

Question, "Upon the facts found by the special verdict in this case, is the Plaintiff below, *Henry Albert Beamish* the legitimate son of the late Rev. *Samuel Swayne Beamish*?"

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Mr. Justice *Willes* (Mr. Justice *Byles* being present, Mr. Justice *Hill* being on circuit, and therefore excused attendance) delivered the following Opinion on behalf of himself and his learned brethren:—

My Lords, the answer to this question depends upon whether, after the Reformation, and before Lord *Hardwicke's* Act in *England*, or 7 & 8 *Vict.* c. 81, in *Ireland*, a clerk in orders could effectually contract marriage without the presence of another clergyman; in short, whether a clergyman can marry himself.

In dealing with the question we must bear in mind, that by direction of the House the argument proceeded upon the assumption that the case of *The Queen v. Millis* (*h*) is a binding authority for the proposition necessary to sustain the result therein arrived at, as appears by the record; which proposition is, that a marriage, however solemnly celebrated, was invalid at the common law,

(*h*) 10 Clark & Fin. 534.

unless contracted in the presence of a priest in holy orders.

That being so, all authorities and arguments tending only to prove that no clergyman need have been present at the marriage are excluded by the hypothesis upon the one hand, whilst, upon the other, it may be considered that if a second clergyman had been present, and had married the father and mother of the Plaintiff, the other circumstances in which the marriage actually took place remaining the same, such marriage, however irregular and reprehensible, and to whatever extent it might have exposed all parties to censure and punishment, would have been valid.

The precise question which we have to answer, therefore, is, whether, assuming that by the common law the presence of a priest was essential to the validity of a marriage, which involves that at the marriage of a layman there must have been a third person present, the marriage of a clergyman might yet be effectually performed without the presence of any other than himself and the person taken as his wife.

We have found it necessary to look at the subject from two principal points of view, in considering the following questions :

First, whether the history of the law relating to the marriage of the clergy points to any and what distinction in this respect between the clergy and the laity, and herein whether the clergy used at any time to be married in a different manner from the laity ?

Secondly, whether the history of the laws requiring the presence of a clergyman as proper for the due celebration of a regular marriage, or essential to the contracting of a valid one, points to any duty incumbent upon the clergy-

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man such as could not be discharged with equal and propriety by one of the contracting parties?

The first of these questions was not much argued at the bar. It was assumed in general terms, and not disputed, that the marriages of the clergy were prohibited in early times; and it was even argued that one of the purposes of the Reformation may have been to give a new privilege to the clergy, without imposing any restriction as to the manner in which that privilege was to be exercised. In short, that the previous law, when made, may only be applied to the marriages of laymen, and that the marriages of the clergy may stand upon a distinct footing.

We have found it necessary to examine this particular argument closely, and have arrived at conclusions altogether opposed to the propositions thus put forward, which we conceive to have an important bearing upon the main inquiry.

In dealing with this first question, it is necessary to refer to the history of the enforced celibacy of the clergy, and afterwards more particularly to the statutes by which at the period of the Reformation this restraint was removed. It appears that a distinction existed in that time between the regular and secular clergy, and that distinction was especially observed in this country. The regular, unlike the secular clergy, appear from an early period to have taken what was called the solemn vow, distinguished from a simple vow of chastity, accompanied by an express, not merely a tacit or implied, promise, publicly made, and accompanied by entering into a regularized religious order, and not merely into a lawful ecclesiastical society.

With respect to both classes of the clergy, the law of the Western Church will be found stated in the

“*Traité du Contrat de Mariage*,” part 3, chapter 2, article 5; “*De l’Empêchement que forment les Vœux solennels*” (volume 6, page 47, of the Paris edition of 1846, by M. *Bugnet*, to which we shall throughout refer); and article 6, “*De l’Empêchement qui résulte des Ordres sacrés*” (6 *Pothier*, page 51).

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As to the regular clergy abroad it appears that before the first Council of Lateran, held in 1123, their marriages were valid; and their profession constituted only *impedimentum prohibitivum*, not *impedimentum dirimens*.

The prohibition thus imposed upon the regular clergy included only those who had taken the solemn vow already mentioned, and entered into a regular house of religion. A simple vow of chastity, whether tacit or express, did not of itself constitute an impediment (6 *Pothier*, 50, sec. 6, id. 213, *et seq*).

With respect to the regular clergy, professed and entered in a house of religion in *England*, their condition was, probably, from a time before the conquest up to the reign of *Hen. VIII.*, considered, for all purposes of personal benefit, as that of civil death; and their marriages, contracted after profession, were, according to the better opinion, absolutely void. (*Coke Littleton*, 135 b: *Littleton*, sec. 200. 202, and the Commentary.) The dictum referred to in 1 *Rolle’s Abridgment*, *Baron and Feme* (A. 9-10), *contra*, seems incorrect.

As to the secular clergy, not entered or professed in religion, of the degree of bishops, priests, deacons (and sub-deacons in the Roman Catholic Church), it appears that, except for a short period, under the code of *Justinian* (A. D. 529) lib. 1. tit. 4, *de Episcopis et Clericis*, mitigated by the effect of the 6th Novel, cap. 5, which substituted the penalty of loss of orders for that of nullity, there was no instance of any law, civil or ecclesiastical, for annulling

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the marriages of the secular clergy, before the twelfth century. The canon of the first Council of *Lateran* (A. D. 1123), confirmed and more distinctly expressed at the second Council of the same name (A. D. 1133), was the first which decreed the nullity of marriages contracted by persons in holy orders. How much this restriction has been treated as one *positivi juris* appears by St. *Augustin's* question, and the answer of *Gregory the Great* (1 *Wilk. Conc.* 9), and in the present day by the notes to *Pothier* (51.53), in which it is stated that the marriages of the clergy are, by reason of the provisions of the code civil, no longer subject to any legal impediment in *France*.

With respect to *England*, there exist proofs that the marriages of the secular clergy, though considered objectionable by the higher ecclesiastics, constantly occurred, and were not either void or voidable here before the latter part of the twelfth century. Numerous traces of this subject are to be found in the collection of the ancient laws and institutes of *England*, published in 1840, under the direction of the Record Commissioners. The earliest is in the Penitential of *Theodore*, Archbishop of *Canterbury*, (A. D. 660 to 690) where, in chapter 18, section 4 (1st Ancient Laws, 14) it is laid down that for a married man, raised to holy orders, afterwards to cohabit with his wife, is adultery, by reason of the notion, elsewhere expressly put forward, that the Church is his spiritual spouse. To the same effect is the fragment of the same prelate at page 74, where it is said of such a case, “unde et de carnali fit spirituale connubium. Oportet eos nec dimittere uxores et quasi non habeant si habere; quo salva sit charitas connubiorum et cesse operatio nuptiarum.” Then section 6, page 14 of the Penitential, treats of priests and deacons marrying while in holy orders. “Presbyter vel Diaconus si uxorem

extraneam duxerit in conscientia populi, deponatur. Si vero adulterium" (explained by the preceding section to mean by reason of his being married to the Church) "*perpetraverit cum illâ, et in conscientia populi devenit, projiciatur extra ecclesiam et pœniteat inter laicos quamdiu vixerit.*" It is clear that this passage relates to actual, not *quasi* wives, because the context refers to the wives of those who were raised to orders after being married, and makes a distinct provision for the case of fornication with a woman not the priest's wife, and that of adultery with the wife of another.

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To the same effect is the Penitential of *Ecgbert*, Archbishop of *York*, A. D. 735 to 736. "*Si presbyter vel diaconus uxorem duxerit perdat ordinem suum; et si postea fornicati fuerint, non solum ordine priventur, sed etiam septem annos jejurent, juxta sententiam episcopi.*"

To the same effect is a document of the tenth century, called *Institutes of Polity*, civil and ecclesiastical, to be found in 2 *Ancient Laws*, 335, chapter 22, which recites as the doctrine of the previous councils, that "it was right if a minister of the altar, that is, a bishop, or a mass priest, or a deacon married, that he forfeited his order for ever, and should be excommunicated, unless he should repent, and the more deeply atone." * * * * *

"A priest's wife is nothing but a snare of the devil, and he who is ensnared thereby on to his end, he will be seized fast by the devil, and he also must pass afterwards into the hands of fiends, and totally perish," &c.

The same is laid down in *Ælfric's* canons, shortly before the Conquest, (*Wilkins' Anglo-Saxon Laws*, 154; 2 *Ancient Laws*, 345), which state the penalty to be forfeiture of orders.

The *Anglo-Saxon* clergy, however, were far from being of one mind upon this subject. The law of the *Northum-*

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brian priests (stated by *Pothier* to be of the tenth century), provides, section 35, "If a priest forsake a woman (*Cwenan*), and take another, let him be excommunicated." The word here translated "woman" is neither the word applied to a wife in the same law, canon 64 ("*Æwe*"), nor that applied to a concubine ("*Cyfese*"), in other laws of the same period. It may, according to the dictionary, be translated wife, woman, or harlot.

These ecclesiastical documents only refer to penance and deprivation, not nullity, which indeed they could not impose.

In the laws of the kings during the same period we find no direct mention of the subject of marriage of the clergy whilst in orders, though there are several in which the duty of chastity is inculcated.

The first is the law of King *Edmund* (who reigned A. D. 940 to A. D. 946), Ecclesiastical Division, No. 1 (1 Ancient Laws, 245). The canons called of *Edgar* (who reigned A. D. 959 to 975), if they can properly be classed as laws, provided specially for the case of a married person raised to orders (Canons 17, 2 Ancient Laws, 271); and as to the rest, canon 60 enjoins, "That no priest love overmuch the presence of women, but love his lawful spouse, that is, his church." The next is the law of *Ethelred* II., who reigned A. D. 978 to 1016, chapter 5, No. 9 (1 Ancient Laws, 307). The last is the law of King *Canute*, who reigned A. D. 1017 to 1036, Ecclesiastical Division, No. 6.

All these laws enjoin chastity, but under sanctions not involving nullity of marriage.

It seems, therefore, that before the Conquest there was no law, either civil or ecclesiastical, in this country, making orders *impedimentum dirimens*. Dr. *Lingard* states (compare 1 Anglo-Saxon Church, 176; 2 *id.*,

252 *et seq.*) that at the end of the *Anglo-Saxon* period “the married priests at length became sufficiently numerous to bid defiance to the laws of both the church and the state.” He expresses an opinion that such marriages first began in the latter part of the ninth or even as late as the tenth century ; and he states that for three centuries after the mission of *St. Augustin* there is no mention of a married priest in any written document. The inference, however, seems hardly reconcileable with the articulate recognition of the fact of the marriage of priests, and other their intercourse with women, in the Penitential of *Theodore*, who wrote less than a century after *Augustin*. And Mr. *Kemble*, in his *History of the Saxons in England*, vol. 2, pp. 439 to 447, refers to many instances in which the children of priests are spoken of, and other traces of their marriages occur in ancient documents, as affording an “almost unbroken chain of evidence to show, that in spite of the exhortations of the bishops and the legislation of the Witan, those, at least, of the clergy who were not bound to a cœnobitical order, did contract marriage, and openly rear the families which were its issue.”

Dr. *Lingard* farther states (*History of Anglo-Saxon Church*, vol. 2, p. 254, note 1), that “married priests were, strictly speaking, those who had been married before ordination. After ordination they were more loosely said to marry, *wiffian*, to take wives, when the parties lived together by mutual agreement only ; for there existed no legal form by which they could be married.” This statement can, however, amount to nothing more than that by the church their marriages were considered objectionable, though not void, and that there was no ceremony provided other than that by which laymen could be married. The priests who, as a rule, held out against the bishops, and persisted in marrying

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and in living with their wives, could have felt little difficulty in performing the marriage ceremony for one another.

This state of things appears to have continued long after the Conquest, and after the charter of *William* had separated ecclesiastical causes from civil, and in the amplest manner transferred the former to the jurisdiction of the bishops; and indeed until late in the twelfth century, long after the second Council of *Lateran*.

The constitution of *Lanfranc* in 1076 only enforced the former law. It allowed priests already married in certain cases to retain their wives, and forbade for the future the ordination of married persons: “*Decretum est ut nullus canonicus uxorem habeat. Sacerdotes vel in castellis vel in vicis habitantes, habentes uxores non cogantur ut dimittant; non habentes interdican- tur ut habeant, et deinceps caveant episcopi ut sacerdotes vel diaconos non presumant ordinare, nisi prius profiteantur ut uxores non habeant.*” (1 *Wilkins’ Concilia*, 367.)

At many subsequent councils before the year 1175 the language held is uniform, that the consequence of a priest marrying was simply forfeiture of his orders. For instance, the Council of *London*, A. D. 1126, s. 13 (1 *Wilkins’ Concilia*, 408); and that of *Westminster*, A. D. 1127, s. 5 (*ibid.* 410). The language of this council indicates that wives of priests were regarded less unfavourably than their concubines; “*Quodsi concubinis (quod absit) vel conjugibus adhæserint,*” &c. The same can hardly be said of that of *Westminster*, A. D. 1173 (*ibid.* 474,) III. “*Clerici focarias non habeant. IV. Conjugati ecclesias non habeant seu ecclesiastica beneficia.*” From about this period the change in the law may, we think, be dated.

During the early part of the twelfth century, an oc-

ce took place which shows the then existing state
 ings in so singular a light, that we cannot forbear
 alling attention to it. The bishops on two occa-
 n the reign of *Henry I.*, applied to that monarch to
 the marriages of the clergy with the secular arm.
 the first, when the king required concessions from
 ly see, they were successful; to cite the margin of
 ount in Sir *Henry Spelman's* Codex (at the end of
 us' Anglo-Saxon Laws, 300)—“*Sacerdotes acrius*
conjugia sua.” Upon the second occasion (A.D.
 six years after the first Council of Lateran, the
 was altogether different, as appears from *Spelman's*
 , 309, referring to the chroniclers. “Anno 1129,
 29° rex ad calend. Aug. magnum Concilium
 ni tenuit de uxoribus sacerdotum prohibendis,
 atesque ambo episcopi cum suffraganeis suis,
 am de eorundem uxoribus (focarias vocat Pari-
 s) regi concesserunt. Imprudentiâ, ut calump-
 nit, Gulielmi Archiep. Cantuariæ, sed aliis omnibus
 pis consentientibus. Rex autem acceptâ a sacer-
 is ingenti nummorum mole, uxores eis permisit
 , et illusâ hoc commento episcoporum constitutione,
 ludibrium transiere.” In 1 *Wilkins' Concilia*, 411,
 the occurrence is related, without mention of the
 and the account concludes thus: “Rex eis omnibus
 domum redeundi licentiam, adeoque domum re-
 sunt, nec ullam vim habuerunt omnia illa decreta.
 ti retinuerunt suas uxores regis veniâ sicut ante
 nt.”

the year 1175 a change is distinctly observable;
 t the Council of *London* in that year (1 *Wilkins'*
ilia, 476), reference is made to a decretal of *Alex-*
III., who was pope in the time of *Henry II.*, and the
 ger of *a'Becket*. After providing for the case of the

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inferior orders of the clergy, it proceeds, “qui autem in subdiaconatu vel supra ad matrimonia convolaverint mulieres etiam invitas et renitentes relinquant.”

The constitution of *Richard Wethershed*, Archbishop of *Canterbury*, (A.D. 1229 to 1231), *Lyndwood's Provinciale*, 118, follows the terms of the decretal of *Alexander III*. These constitutions could not of themselves make law, but they may serve to indicate the date at which the discipline of the Council of Lateran was first introduced.

Up to nearly the end of the twelfth century, therefore it seems that orders did not constitute *impedimentum dirimens*, but from that time forward until the sixteenth century they did, not absolutely, but subject to the condition that the marriage was valid unless annulled by divorce in the Court Christian during the lifetime of the parties. This point was more than once decided by the courts of common law in cases referred to by Lord Coke in the margin of *Coke upon Littleton*, 136 a., where, after speaking of the four orders of friars, monks, canons, and nuns, he says, “For all these are regular and votaries and are dead persons in law; but so are not the secular persons, as prebends, parsons, vicars, &c. And therefore it is holden in our books, that if a secular priest taketh wife and hath issue, and dieth, the issue is lawful, and she inherit as heir to his father, &c., for (as it was then holden) (i), the marriage was not void, but voidable by divorce, and after the death of either party no divorce could be had. But if a man marrieth a nun, or a monk marrieth, their marriages were holden void, and the issues bastards, because (as it was then holden) the marriage was utterly void, for that the nun and the monk were dead persons in the law.”

(i) Year Book, 21 H. 7, M. 39 b, is in point.

Such was the law up to the passing of the 31st *Hen.* 8, c. 14; for the 1st *Hen.* 7, c. 4, does not mention, and if it included did not annul marriages, but only gave the Ecclesiastical Courts power to punish by imprisonment clerks guilty of “adultery, fornication, incest, or any other fleshly incontinency.”

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The 31st *Hen.* 8, c. 14, was the Act “abolishing diversity in opinions.” And amongst other questions therein resolved was, “whether priests, that is to say, men dedicate to God by priesthood, may marry or no.” This question it answered in the negative. The second section made the marriage of a priest felony, without benefit of clergy, both in the man and woman. The fourth section enacted that such marriages “shall be utterly void and of none effect,” and that the proper ordinaries “shall from time to time make separation and divorces of the said marriages and contracts.” Subsequent sections imposed minor punishments upon concubinage, and subjected the wife in the one case, and the concubine in the other, to the same penalties as the priest. It is observable that this statute related to priests, and not to those lesser orders of clergy (*j*) which were included in the general prohibition, and that it pointedly recognized the difference between the wife and the concubine of a priest, clearly pointing, in the case of the former, to actual marriage.

The Act of 31st *Hen.* 8, c. 14, was amended in the following year (1540) by the 32d *Hen.* 8, c. 10, an Act “for moderation of incontinence for priests,” by which the penalty of death was taken away, and minor pains were substituted.

Thus matters stood until the passing, in the year 1548,

(*j*) See for the probable reason, Lyndwood, 118, note (*i*).

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of the Act of 2d and 3d *Edw.* 6th, c. 21, “ An Act to take away all positive laws against the marriage of priests,” the recital of which is material: “ Although it were not only better for the estimation of priests and other ministers in the church of God to live chaste, sole and separate from the company of women and the bond of marriage, but also thereby they might the better intend to the administration of the Gospel, and be less intricate and troubled with the charge of household, being free and unburdened from the care and cost of finding wife and children, and that it were most to be wished that they would willingly and of themselves endeavour themselves to a perpetual chastity and abstinence from the use of women; yet forasmuch as the contrary hath rather been seen, and such uncleanness of living and other great inconveniences not meet to be rehearsed, have followed of compelled chastity, and of such laws as have prohibited those the godly use of marriage, it were better and rather to be suffered in the commonwealth that those which could not contain should, after the counsel of Scripture, live in holy marriage, than feignedly abuse, with worse enormity, outward chastity or single life.” The statute goes on to enact, that every law and laws positive, canons, constitutions, and ordinances heretofore made by authority of man only, which do prohibit or forbid marriage to any ecclesiastical or spiritual person which by God’s law may lawfully marry, in all and every article branch, and sentence concerning only the prohibition for the marriage of the person aforesaid, shall be utterly void and of none effect; and that all manner of forfeitures &c. “ concerning the prohibition for the marriage of the persons aforesaid be of none effect, as well concerning marriages heretofore made by any of the ecclesiastical or spiritual persons aforesaid, as also such which hereafter

shall be duly and lawfully had, celebrate, and made betwixt the persons which by the laws of God may lawfully marry."

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Then follows a proviso showing the anxiety of the legislature that the marriages of the clergy should be subject to the same rules and contracted with the same ceremonial as those of the laity: "Provided that this Act or anything therein contained shall not extend to give any liberty to any person to marry, without asking in the church, or without any ceremony being appointed by the order prescribed and set forth in this book, entitled 'The Book of Common Prayer and Administration of the Sacraments,' &c., anything above mentioned to the contrary in anywise notwithstanding."

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Doubts appear to have arisen upon that statute, whether it made the children legitimate; and to remove those doubts the 5th and 6th *Edw.* 6, c. 12, enacted, that such marriages should be valid to all intents and purposes, the children legitimate, and the husbands and wives entitled to estates by the courtesy and dower; with a proviso, section 3: "Provided always, that this Act nor anything therein contained shall extend to give liberty to any person to marry without asking in the church, or without the ceremonies according to the Book of Common Prayer and Administration of the Sacraments, nor shall make any such matrimony already made or hereafter to be made good which are prohibited by the law of God for any other cause."

These statutes of *Edw.* VI. were repealed in 1553 by the statute of 1 *Mary*, s. 2, c. 2, and were revived by its repeal in 1603, by the Act of 1 *James*, c. 25.

During the reign of *Elizabeth* the liberty of marriage of the clergy appears to have rested upon the 32d article of the 39 passed in convocation and confirmed, 1562, and

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as to part (*k*) recognised by Parliament in 13 *Eliz.*, c. 12, s. 5, which required subscription and assent thereto: “Bishops, priests, and deacons are not commanded by God’s law either to vow the estate of single life, or to abstain from marriage; therefore it is lawful for them, as for all other Christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness.”

This inquiry into the history of the law relating to the marriage of the clergy has led us to the conclusion that there is nothing either in the common or statute law which points to any distinction between the clergy and the laity, in respect of any superior facility given to the former as to their own marriages, or the mode of celebrating them. There was no provision for their marriage at the common law distinct or different from that applicable to laymen. Nor was it likely that there should be, seeing that their marrying was considered by the higher ecclesiastics to be objectionable, as, indeed, the recital of the 2 and 3 *Edw.* 6 shows that it so continued to be looked upon by many until the dawn of the Reformation; and the statutes of *Edw.* VI. and the 32d Article, upon which the present state of things is founded, expressly put the clergy into the same condition in this respect “as other Christian men;” the statutes, moreover, with a proviso for such marriage taking place after the usual notice, and with the established ceremony, to which the clergy, above all, were in duty bound to conform.

To this must be added, that, with the exception of the present case, and of the two unreported cases which were mentioned in argument, viz., *Goole v. Hudson*, in the Court of Arches, 1733, and *Holmes v. Holmes*, in 1814 to

(*k*) See 1 Hallam’s *England*, 4 ed. 170. 188.

1818, in the Consistorial Court of *Dublin*, we have not been able to find an authentic account of any instance, nor, except what has been already mentioned, a suggestion of any instance of a clergyman having at any time married himself. This seems the proper place at which to notice those two cases.

Goole v. Hudson appears to have been a suit instituted in the Arches Court by a clergyman over fifty and a widower, against the daughter of one of his parishioners, a young woman under age, whom he had induced on the 10th of *June* 1731, in the house of her mother, during her temporary absence from home, to go through, with him, whilst they were alone, a form of marriage, by their saying that they took one another for man and wife, according to the formulæ, in the Marriage Service: “I, *N.*, take thee, *M.*,” &c., and “I, *M.*, take thee, *N.*,” &c.; and by the giving of a ring, with the words, “With this ring I thee wed,” &c. The other parts of the service were omitted. The libel also stated a promise to marry, independent of this ceremony, and referred in proof thereof to certain letters, of which no copies are forthcoming. There had been no cohabitation; and the prayer was, that a subsequent marriage contracted by her on the 29th *July* 1731, *in facie Ecclesiæ*, with one *Boyce*, should be declared void, that the Proponent and Respondent should be declared man and wife, and that she should be compelled to solemnise matrimony with him *juxta juris exigentiam*. The answer of the Respondent admitted that the alleged ceremony had taken place, but stated that it was in jest, and without any intention of contracting marriage. She admitted the letters, and that she subscribed them as his “spouse,” but at his request. The evidence is not before us, but only the interrogatories.

The decree pronounced that the parties “did enter

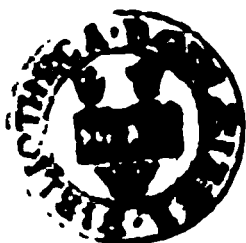
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into and celebrate between themselves, on the 10th June 1731, a pure and lawful matrimonial contract by words in the present tense effectual," &c., and went on to pronounce for the validity of the "matrimonial contract and espousals so entered into and contracted," and pronounced them to be husband and wife, and pronounced and declared the marriage with *Boyce* to be null, and that the Respondent ought to be compelled by law to solemnise a true, pure, and lawful marriage in the face of the Church with the Proponent, and admonished her so to do.

In explanation of this decree, pronouncing the parties to be man and wife, we may remark, that in this respect it is substantially the same as that in the case of *Cecilia de Portynton*, in the fourteenth century, cited by Lord *Lyndhurst* (10 *Clark and Finnelly*, 841), which his Lordship used as illustrating the proposition, that such a contract or espousal was considered as irrevocable, and as *verum matrimonium*, for many purposes, by the Court Christian; although he went on to argue that for other purposes affecting civil rights it was not operative before it was celebrated *in facie Ecclesiæ*; and thus Lord *Lyndhurst* accounted for the decree, after pronouncing the parties to be man and wife, going on to enjoin a solemnisation of the marriage in the face of the Church.

No such case could have occurred in *England* after 1754, the date of Lord *Hardwicke's* Act; but in *Ireland* it could, until 1818, when suits for compelling the performance of a marriage ceremony, and celebration of marriage *in facie Ecclesiæ*, were first put an end to there.

The case of *Holmes v. Holmes* in the Consistorial Court in *Dublin* first came before it in 1814, in the form of a suit by the woman for the restitution of conjugal rights.

In that suit the present question could not have arisen upon the proceedings, because, as amended, they stated a marriage generally according to the rites of the Church, but did not state any celebration of the marriage by the Respondent as a clergyman in holy orders. That suit was dismissed without prejudice and without costs. A suit was then instituted by the woman similar to that in *Goole v. Hudson*, and the farther amended allegation of the Promovent stated that the Impugnant, being a clergyman in holy orders, a ceremony of marriage was celebrated between them on the 11th *April* 1811, in the same manner as that which appears by the special verdict to have been performed in the present case, except that no ring was used. In that case there was cohabitation before and after the alleged marriage contract. The Respondent denied that he ever promised or intended to marry the Promovent, but admitted that, being in her power, and moved by her importunity and threats, and in order to avoid exposure, he had, on the occasion alleged, read portions of the marriage service, but not the whole thereof, and not as a celebration of his marriage, but in order that she might obtain a more solemn promise or contract than she thought she otherwise could; and that he did not intend it to be binding on him as a legal ceremony, or as a legal or sufficient contract. The alleged ceremony of marriage was proved by one witness, who was present, and her evidence was confirmed by that of another witness, whom the Defendant had sent for the Prayer Book. These seem to be the material facts.

The decree pronounced that the parties did, on the 11th of *April* 1811, make a valid matrimonial contract, and take one another *per verba de præsenti* as man and wife; and it ordered that a lawful marriage should be celebrated in the face of the Church, by a priest in holy

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orders of the Church, according to the rites, ceremonies, and canons thereof; and enjoined both parties to enter into and cause the said marriage to be solemnised *in facie Ecclesiæ*.

We have no account of the argument, or of the judgment of the Court in either of these cases, and we cannot tell upon what grounds the decrees respectively proceeded. The same decrees would have been made if the husbands had been laymen. Whether the Court considered the fact of their being in orders, and intended to decide that it made no difference in the effect of what had been done, or whether the matter passed *sub silentio*, we cannot tell and have no means of ascertaining.

We cannot, therefore, treat these cases as of any binding authority. All that can be said of them is, that, except the present case, they are the only authentic instances within our knowledge in which such a course was adopted; and that what was done in those cases does not appear to have been treated as constituting a complete marriage.

It has, however, been argued, that the course pursued, though admitted and proved to be eccentric, does not transgress the bounds of irregularity; and it was endeavoured to sustain that proposition by taking the usual ceremony of marriage to pieces, and showing that each of its parts in succession might be dispensed with as unnecessary, except the presence, in fact, of a clerk in holy orders, which presence in this case literally there was, for the intended husband was a clergyman, and was present.

This brings us to the second proposed head of inquiry; namely, into the history of the law requiring the presence of a clergyman as proper or necessary at the celebration of a marriage, for the purpose of ascertaining

the character of his functions, in order that we may thus be in a condition to determine whether they can properly or effectually be discharged by one of the contracting parties.

This inquiry again divides itself into three branches: In respect of, first, the religious character of the ceremony; second, the notoriety and proof of marriage; and third, the prevention of such marriages as are forbidden by law.

First, is the clergyman required to be present only as an ecclesiastical entity representing the church, for the purpose of giving a religious character to the ceremony, and of invoking by ordained lips the blessing of Heaven upon the union; and is this all that he has to do? Because, if so, all this is supplied by the fact of one of the two contracting parties being ordained. If these are all the uses of the officiating clergyman, it is in vain to argue that a man cannot invoke a blessing upon his own marriage, in the form and substance of the nuptial benediction, as used from the earliest times. It seems inconceivable that such or any benediction can emanate in any respect from, though in terms it need not include, the human being who pronounces it; or that a blessing is anything more than a prayer to the Almighty that He will vouchsafe to bless those who are its object. If such be the office of the clergyman, it is in vain to say that marriage was formerly in this country, as now in the church of *Rome*, considered as a sacrament; and that a person could not administer it to himself; or to cite authorities to show that in the opinion of theologians a man cannot administer one sacrament, that of baptism, to himself. The contrary is established and enjoined as to the sacrament of the Lord's Supper. The contrary is main-

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tained by a host of authorities as to marriage itself, w considered as a sacrament.

The next view which has been suggested is, that law requiring the presence of a clergyman as essen is not sufficiently explained by the desire to introdu religious element alone; and that it was intended he should be present as a trustworthy witness to the tract, who might be able to form a judgment whether parties take one another, freely and entirely, for man wife, and to bear witness thereafter to the fact. If view be adopted, a strong reason will suggest itself the clergyman who marries the parties ought to be a t person; because the ceremony of a clergyman b present at his own marriage is not, in point of notori and the preservation of evidence, the same as, nor equivalent to, that which the law in this view of it w require, as generally necessary to the validity of a marriage; namely, the presence of a clergyman as a witness thereto.

The remaining view of the office of the clergy suggests the inquiry, whether he has indeed but a part in the ceremony; so that although his presence necessary as a witness, yet that, being present, he can prevent the parties from marrying one another, whatever may be the impiety or illegality of the proceeding; whether, on the contrary, he really has an active duty choice in this matter. Whether he may not require proper steps to be taken to make the marriage regular before he allows of its celebration? Whether, if a plausible objection were urged to the marriage, and sufficient security given, he could effectually postpone it? Whether, if he knew of a "just impediment why the parties should not be joined together in holy matrimony," s

an impediment as before Lord *Lyndhurst's* Act (5 & 6 W. 4, c. 54), would have left the marriage valid for all civil purposes, unless and until it was annulled by a decree of the Court Christian, pronounced during the lifetime of the parties, and until then would have left them man and wife; he had authority to forbid the incestuous union, or possessed no means of repelling the profanation, except by taking to flight before the words of consent were gabbled in his presence? In fine, whether the clergyman has power to prevent the marriage by dissent?

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Should this question be answered in the affirmative, it will be obvious that the intended husband cannot properly be the person to marry the parties. It would be irrational to entrust the person whose interest it is to effect the marriage with the duty of saying whether it be fit that it should take place. It is no sound argument to say that a third person might neglect his duty by passing over objections to the regularity, decency, or other requisites of a properly conducted marriage, and that if he did so, the parties might, notwithstanding, become man and wife. If the law demands the presence of an officer upon whom the duty is imposed of requiring the observance of the conditions under which the marriage ought to take place, it is not because that duty may be disregarded by the proper person to fulfil it, and yet the marriage stand good, and censure and punishment of the offender be the only consequence, therefore that the duty may be and is entrusted to a person whose interest it must be to disregard its fulfilment in every instance in which that could be efficacious.

We proceed with the object of ascertaining the true answers to these several questions; and in doing so, your Lordships are aware to how great an extent we are as-

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sisted and anticipated by the argument and the judgments in *The Queen v. Millis*, and also by those in the present case, both here and in the Court of Exchequer Chamber in *Ireland*. It is no part of our duty or our design to repeat what has already been better said by others ; but it is necessary for us to make a general statement of what we conceive to be the law ; to consider the authorities which have been relied upon as bearing more particularly upon the present case ; and to state such new matter as we think worthy of consideration.

The general law of western Europe, before the Council of *Trent*, seems clear. The fact of marriage, namely, the mutual consent of competent persons to take one another only for man and wife during their joint lives, was alone considered necessary to constitute true and lawful matrimony, in the contemplation of both Church and State.

This is fully established by the authorities collected by *Pothier* in the treatise already referred to, part 4, chap. i., sec. 3., sub-sec. 31, p. 152 : “ De l’antiquité de la bénédiction nuptiale, et de la célébration du mariage dans l’Eglise, et si elles étaient nécessaires dans les premiers siècles pour la validité des mariages ; ” and sub-sec. 3, p. 156 : “ Du droit qui s’observait dans le douzième siècle et les suivants, jusqu’au temps du Concile de *Trente*, à l’égard des mariages clandestins ; c’est-à-dire, qui n’étaient pas célébrés en face de l’Eglise. ” The author points out that the celebration of the marriages of christians in the face of the Church, and with the nuptial benediction pronounced by a priest (*nubere in Domino*), dates from the earliest christian times. He cites a passage from *Tertullian*, who lived in the second and third centuries, extolling the marriage “ *quod Ecclesia conciliat, confirmat oblatio, obsignat benedictio.* ” In explanation of the origin of the nuptial benediction, he cites a passage

from *St. Isidore of Seville*, who lived in the fifth and sixth centuries, to show that this benediction, to which a certain peculiar efficacy appears to have been attributed, was a similitude of that given by the Almighty to our first parents: “Fecit Deus...et benedixit eis, dicens, Crescite, &c. Hâc ergo similitudine fit nunc in Ecclesiâ quod tunc factum est in Paradiso.” In more modern times *Jeremy Taylor* seems to have had this figure present to his mind, though his application of it was different, when he wrote (Sermon on the Marriage Ring, vol. 4, of *Jeremy Taylor’s* works, edition of 1848, p. 207):—“The first blessing God gave to man was society, and that society was a marriage, and that marriage was confederate by God himself, and hallowed by a blessing.” His similitude for marriage is that of the spiritual union of Christ with his church; and he says, not that it ought to be *per Presbyterum*, &c., but that it ought to begin and end “*in Christo et in Ecclesiâ*.”

Pothier goes on to show, that these religious ceremonies were before the sixteenth century regarded in the light of pious usages of high importance, but not as essential to a valid marriage; and that even when regarded as a sacrament, marriage was held to be complete by the contract of the parties without the intervention of a priest: “Non seulement la bénédiction nuptiale, quoique pratiquée dans l’Eglise, n’était pas nécessaire pour que le contrat de mariage fût valable comme contrat civil, mais encore elle n’était pas plus nécessaire pour qu’il fût sacrement.” (6 *Pothier*, s. 45, p. 154.) The same doctrine is repeated at pp 157 and 160, where he also shows that to have been the doctrine of the Council of *Trent* itself as to past marriages.

We forbear from citing other authorities which can be consulted with equal advantage in the work of *Pothier*,

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but there is one, remarkable from its especial reference to *England*, and, as *Pothier* cites it, to marriages in *England* and from its date, two centuries after the law of *Edmund* and before there was time to forget its existence, which ought not to be omitted. It is the decretal of *Alexander* who was pope A.D. 1159 to 1181, to the bishop of *Norwich* as follows:—"Ex tuis litteris intelleximus quendam et mulierem sese invicem recepisse, Sacerdote præsente, nec adhibitâ solemnitate quam Anglicanâ Ecclesiâ exhibere, et alium prædixisse mulierem antè carnalem commixtionem solemniter dicitur et cognovisse; tuæ prudentiæ duximus respondere quòd, si prius vir et mulier ipsa, de præsenti se recepissent dicendo unus alteri, ego te recipio in meam, et tu recipio in meum: etiamsi non intervenerit illa solemnitas nec vir mulierem carnaliter cognoverit, mulier ipsa debet restitui, quum nec potuerit nec debuerit post consensum alii nubere."

Even if there were no witnesses present at such a marriage, that created a difficulty of proof only, and did not affect its validity. Upon this *Pothier* is express; and he refers to the authority of the same pope, to be found in the *Corpus Juris Canonici, Decretal, Greg. 9, l. 1, tit. 3, c. 2*:—"Quod nobis ex tua parte significatum est, ut de clandestinis matrimoniis dispensare deberemus, videmus, quæ dispensatio super his sit adhibenda. Enim matrimonia ita occulte contrahuntur, quod eorum legitima probatio non appareat; qui ea contrahuntur Ecclesiâ non sunt aliquatenus compellendi. Verum personæ contrahentium hoc voluerint publicare, non rationabilis et legitima causa præpediat, ab Ecclesiâ dispensanda sunt et comprobanda, *tanquam a principi Ecclesiæ conspectu contracta.*"

Whilst, however, it was thought unnecessary, and

haps at first incompetent for the Church to nullify the effect of that which, in the view of a lawyer, was marriage, and, for centuries, in that of the Church herself a sacrament, though irregularly celebrated, yet the practice of clandestine marriages, that is to say, of marriages otherwise than by a priest in the presence of witnesses, was looked upon as odious. This idea, and the understanding of early times as to the part which the priest took in the performance of the ceremony, even when his presence was not absolutely essential, are well expressed in a work of great research, "*Martene de Antiquis Ecclesiæ Ritibus*," vol. 2, c. 9. art. 2: "De ritibus ad sacramentum matrimonii pertinentibus." "Ex his patet ecclesiam etsi quandoque toleraverit clandestina nunquam approbasse matrimonia, sed quæ publice in facie Ecclesiæ coram testibus *confirmante pastore* celebrarentur."

The same writer, in another place, vol. 2, c. 9, art. 3, gives an account of the ceremony of marriage in ancient times, before there was any established ritual or usual form of words; and this passage throws light both upon the question what was the theory of marriage celebrated in the presence of a priest, and upon what was, at first, considered to be the essential element in such a ceremony. After minutely describing the espousals, which, as your Lordships are aware, were quite distinct from, and formerly often preceded, the marriage by a considerable interval, and at which, in the form referred to by *Martene*, the ring was given, he proceeds: "Constituto ad celebrandas nuptias die adveniente sponsus et sponsa benedicendi, a parentibus aut paranympo, qui, ait S. Augustinus (Sermo 293), erat amicus interior conscius secreti cubicularis, sistebantur sacerdoti ad portas ecclesiæ, qui secundum quosdam eos interrogare debebat de fide quam profitebantur. Deinde datis sibi mutuo dextris *exigebat*

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ab utrisque consensum, in quo totam sacramenti matrimonii essentiam reponebant antiqui. Inauditâ quippe inter eos erant illa verba parochi: 'Ego vos conjungo in nomine patris,' &c., in quibus aliqui ex recentioribus scholasticis formam hujus sacramenti constituunt, quæ tamen deciderantur in duobus antiquis ritualibus * * et in aliis pene omnibus quæ a nobis postea exhibebuntur. Quibus adjungere possemus Constitutiones Richardi Episcopi Sarum, anno 1217, editas c. 56, in quibus hæc lego: Item precipimus quod sacerdotes doceant personas contrahentes hanc formam verborum in Gallico vel in Anglico. 'Ego N. accipio te N. in meam.' Similiter et mulier dicat: 'Ego accipio te in meum.' In his enim verbis consistit vis magna et matrimonium contrahitur."

The Constitution of *Lanfranc* (A. D. 1076), referred to in *The Queen v. Millis*, laid stress upon the benediction only. We must, however, observe, that if this constitution, which of itself could not make or alter the law, and was, in fact, but the epitome of an old decretal (*l*), is to be read as pointing out the actual repetition of a blessing, to be, for civil purposes, essential to matrimony, it can, in our opinion, no more be considered as having been adopted into the law, or retained as part of it, when Lord *Hardwicke's* Act passed, than other such constitutions, which, like that of *Durham* (post), required the presence of three or four or several witnesses. For more respecting the nuptial benediction, its origin, when it was pronounced, and when not, and the religious duty of receiving it before the *consummation* of the marriage, we must refer to *Selden, Uxor Ebraica*, book 2, c. 28, vol. 2, col. 687 *et seq.*

The early history of Christian marriages seems, no

(*l*) *Selden, Uxor Ebraica*, Book 2, c. 28, 2 vol. of Works, col. 690, supposed Decretal of Evaristus.

doubt, to point to the religious explanation of the presence of a priest, in order to superadd a blessing to the civil contract; though publicity and the presence of the congregation also appear to have at all times been considered important. It would be erroneous, however, to suppose that even in times prior to those of King *Edmund*, a consideration for the religious character of the ceremony was the only motive for such legislation. There were other reasons which led, in *France*, to the enactment of secular laws, to which we believe attention has not been called, for the prevention of marriages within the prohibited degrees; an object which the law of *Edmund*, so much discussed in *The Queen v. Millis*, also has expressly in view.

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In those times, before the Council of *Lateran*, the prohibited degrees included numerous cases not now within them; and the strict enforcement of the law of the church as to marriages within certain limits of kindred and alliance was repugnant to national habits (*see Decretal, Gregor. 9, l. 4., t. 14, De consanguinitate et affinitate; and History of the Anglo-Saxon Church, vol. 2, p. 6*). The prohibition at one time extended to the seventh degree, but it was found necessary from time to time considerably to limit its operation.

The law of *Edmund* in the tenth century (1 *Ancient Laws*, 257), which we here state for the sake of comparing it side by side with the others of a similar kind, was passed at a time when an extraordinary degree of confidence was placed in the testimony of the clergy when the "word" of a bishop ranked with that of the king, and could not be gainsayed; when the priest was a thane, and his oath equal in value to those of 160 churls, whilst that of a deacon counted for but 60 (1 *Sir F. Palgrave's Rise and Progress*, 164, and 2 *Kemble's*

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Saxons in England, 432); when, moreover, the clergy were the lettered class, and there was some truth in the saying, "*Nullus clericus nisi causidicus.*" At that time, therefore, the presence of a mass-priest was a pledge for the notoriety and certainty and also for the legality of what was done.

The law of *Edmund*, after describing the espousals and their effect, proceeds:—

8. "At the nuptials there shall be a mass-priest by law, who shall, with God's blessing, bind their union to all prosperity."

9. "Well is it also to be looked to that it be known that they, through kinship, be not too nearly allied, lest that be afterwards divided which before was wrongly joined."

To the same effect were the laws of *Charlemagne* (Emperor of the West, A. D. 800) and his successors, referred to by *Pothier*, part 4, c. 1, s. 3, "*des lois qui ont requis pour la validité des mariages qu'ils fussent célébrés en face de l'Eglise;*" from which it would appear that, whilst those laws were in operation, *France*, equally with *England*, furnished an exception to the general law of the Western Church.

The first which we cite is the 408th capitulary, which applies not merely to a first marriage, at which only was the nuptial benediction given, but also to subsequent marriages which were not considered worthy to be clothed with that blessing (6 *Pothier*, 155): "*Ne Christiani ex propinquitate sui sanguinis connubia ducant, nec sine benedictione sacerdotis cum virginibus nubere audeant, neque viduas absque suorum sacerdotum consensu et conventiâ plebis ducere præsumant.*" Upon which *Pothier* remarks, "*Ces capitulaires comprenant dans une même défense les mariages entre parents, et ceux qui se con-*

contract sans bénédiction nuptiale, ou au moins sans l'intervention de curé, il s'ensuit que cette défense était faite sans peine de nullité."

He cites other laws of a like character, all of which have been passed for the purpose of preventing clandestine marriages. The most remarkable is capitulary 179, book 7, where it is said: "Sancitum est ut publicè nuptiæ ab his qui nubere cupiunt, fiant, quia sæpe in occultis clam factis gravia peccata. Et hoc ne deinceps, omnibus cavendum est, sed prius conveniendus est sacerdos in cujus parochiâ nuptiæ fieri debent, in ecclesiâ cum populo, et ibi inquirere unâ cum populo ipse sacerdos debet, si ejus propinqua sit an non Postquam ista omnia probata fuerint, et nihil impedierit, tunc, si virgo fuerit, cum benedictione sacerdotis, sicut in sacramento continetur, et cum consilio multorum bonorum virorum, publicè et non occultè ducenda est uxor."

These laws were not, it is true, without their peculiarities. *Martene*, vol. 1, page 604, cites as a reason for the law last referred to, capitulary 179, book 7: "Quia multi ex clandestinis conjugiiis procreari solent cæci, idi, gibbi et lippi, sive alii turpibus maculis aspersi." That reason, however, need not be understood as addressed altogether to superstitious fears, but as setting forth the evils believed to result from marriages between near relations.

Another of these secular laws, adopted from the *Visigoths*, imposed a fine of 100 sous, or, in default of payment, the penalty of 100 lashes, upon such Christians as would contract matrimony without the nuptial benediction.

The Law of Capitulary, 179, book 7, is stated by *Pothier* to have been adopted and incorporated in the decree of a synodal council held A. D. 909.

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It appears, therefore, that by this ancient legislation a valid marriage could only have been made with the assistance of a priest, whose duty it was, amongst others to take care that the parties were not within the prohibited degrees, and not to marry them if they were, or if there appeared any other just impediment, “postquam ista omnia probata fuerint, et nihil impedierit.”

Another place, in which we find the same object avowed, and the duty of the priest plainly expressed, is in the decree of the Council of *Lateran* (12th century) by which, however, the performance of the duty was not enforced by annulling the marriage when it was neglected or even when no priest was present to perform it; except it should seem, in one class of cases, namely, that of persons within the degrees in which marriage was prohibited by the Church, subject to dispensation, those being more extensive than the degrees in *Leviticus*. In such cases the Council of *Lateran* contemplated that persons ignorant of such impediment might become man and wife by contracting marriage *in facie Ecclesie*, through the intervention of a priest, though without such a ceremony their union would not have been marriage. “Quum inhibitio copulæ conjugalis sit in ultimis tribus gradibus revocata, eam in aliis volumus districte servari. Unde prædecessorum nostrorum vestigiis inhærendo, clandestina conjugia penitus inhibemus, prohibentes etiam, ne quis sacerdos talibus interesse præsumat. Quare specialem quorundam locorum consuetudinem ad alia generaliter prorogando statuimus ut, quum matrimonia fuerint contrahenda, in ecclesiis per presbyteros publice proponantur, competenti termino præfinito, ut infra illum, qui voluerit et valuerit, legitimum impedimentum opponat, et ipsi Presbyteri nihilominus investigent utrum aliquod impedimentum obsistat. Quum autem apparuerit probabilis

conjectura contra copulam contrahendam, contractus interdicatur expresse, donec, quid fieri debeat super eo, manifestis constiterit documentis. 1. Si quis vero hujusmodi clandestina vel interdicta conjugia inire præsumpserit in gradu prohibito, etiam ignoranter, soboles de tali conjunctione suscepta prorsus illegitima censeatur, de parentum ignorantia nullum habitura subsidium, quum illi taliter contrahendo non expertes scientiæ, vel saltem affectatores ignorantiae videantur. Pari modo proles illegitima censeatur, si ambo parentes, impedimentum scientes legitimum, præter omne interdictum, etiam in conspectu ecclesiæ contrahere præsumpserint."

It is clear, therefore, that in this, as in the earlier laws to which we have called attention, one object of the presence of the clergyman was to prevent marriages within the prohibited degrees; and, accordingly, that a duty was imposed upon him, if present, to prohibit, and, so far as in him lay, to prevent such marriages.

The same object was one of those contemplated in the constitution of *Richard de Marisco*, Bishop of *Durham*, and Lord Chancellor, A.D. 1217 (1 *Wilkins*, Concilia, 581, 582), which contains the substance of the present rubric. The first article upon this subject, headed, "De matrimonio contrahendo," sets forth the dignity and advantage of marriage as "Sacramentum Christi et Ecclesiæ." The next, "Ne matrimonia contrahantur in tabernis," provides for its decent celebration, "cum honore et cum reverentiâ, et non cum risu, non joco, non in tabernis, potationibusve publicis, seu commensationibus. Ne quisquam anulum de junco vel quacunque vili materiâ, vel pretiosa jocando manibus innectat muliercularum, ut liberius cum eis fornicetur: ne dum se jocari putat honoribus matrimonialibus se abstringat. Nec de cætero alicui fides detur de matrimonio contrahendo, nisi coram sacerdote,

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et tribus vel quatuor personis fide dignis, propter hoc convocatis, ita quod nullatenus per verba de præsenti contrahant nec post matrimonium per verba de futuro contractum carnaliter commisceantur, nisi rite canonicis denunciationibus præmissis, tam ubi mas quam ubi foemina retro conversati sunt.” Persons violating this article were to be punished as disturbers of the peace of the Church; and it was directed to be openly read to the people every *Sunday*. The next article, “De formâ matrimonii contrahendi,” is in the same terms as the constitution of *Richard Poere*, the Bishop of Salisbury of the same date (1 *Wilkins*, 599), mentioned in the passage of *Martene* already cited: “Item præcipimus quod sacerdotes præcipiant et doceant personas contrahentes hanc formam verborum in Gallico vel Anglico, ‘Ego accipio te *N.* in meam;’ similiter et mulier dicat, ‘Ego accipio te *N.* in meum.’ In his enim verbis consistit vis magna, et matrimonium contrahitur.” It then directs that no priest shall marry any, “aliquas conjungere personas matrimonialiter,” without banns being published three times, which was to be done gratuitously; that a priest should not marry unknown persons, “nisi prius ei legitime constiterit quod personæ legitime sint contrahendæ;” and if one of them were unknown, then not without letters testimonial certifying that such person could lawfully marry, and that banns had been published in his or her parish. The article at the foot of the same page (582), “ne matrimonia sine termino præfinito contrahantur,” contains the substance, almost in the words of that part of the decree of the Council of *Lateran* already stated, beginning at the words “quum matrimonia.”

These constitutions serve to show the very origin of the ancient services out of which that in the Prayer Book was mainly composed.

We need do no more than refer to the subsequent constitutions to the same effect collected in *Lyndwood*, 271 *et seq.* Before we proceed to a consideration of the rubric, it will be convenient to inquire whether any light is thrown on the subject by the decree of the Council of *Trent*, which we must direct particular attention, because of much reliance having been placed upon it by Dr. *Myer*, in his able argument for the Plaintiff.

The “*Decretum de Reformatione Matrimonii*” was read at the 24th session of that council held in 1563, and it was carried against the opinion of 56 prelates, who held that the Church had no power to nullify the effect of a sacrament. The decree is prefaced by a statement of the nature of matrimony according to the views of the Roman Catholic Church, and by 12 canons respecting marriage, divorce, and celibacy, and the power and extensive jurisdiction of the Church concerning them. The decree itself commences by stating as indubitable that clandestine marriages made with the free consent of the parties are valid both in law, and also, it should seem as sacraments, “*Rata et vera esse Matrimonia*” (6 *Pothier*, 57), so long as the Church does not hold them to be null. And it anathematizes those who assert the nullity of such marriages, or of marriages of children without the consent of their parents; stating, nevertheless that Holy Church had always, for the best reasons, detested and prohibited such unions. It goes on to recite the inefficacy of former prohibitions, and the evils which had arisen from allowing of marriages contracted by the mere consent of the parties; especially that husbands had left their first wives, with whom they had secretly contracted marriage, of which there was no evidence forthcoming, and then publicly married others, with whom they lived in perpetual adultery: “*Cui malo quum ab ecclesiâ,*

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quæ de occultis non judicat, succurri non possit, nisi efficacius aliquod remedium adhibeatur, idcirco," &c.

The decree goes on to direct (*præcipit*), that for the future, before any marriage is contracted (*contrahatur*), banns shall be published on three continuous feast days in church during Divine service; which having been done, "Si nullum legitimum opponatur impedimentum, ad celebrationem matrimonii in facie Ecclesiæ procedatur, ubi parochus, viro et muliere interrogatis, et eorum mutuo consensu intellecto, vel dicat, 'Ego vos in matrimonium conjungo in nomine patris, et filii, et spiritus sancti,' vel aliis utatur verbis, juxta receptum uniuscujusque provinciae ritum."

It then provides that, in case there is probable cause to suspect that the banns may be maliciously forbidden, then they shall be published but once: "Vel saltem parochus et duobus vel tribus testibus præsentibus matrimonium celebretur." In such case, the banns are directed to be published before the consummation of the marriage, unless the ordinary, in his discretion, dispense with them; in other words, unless the marriage be by license. Then follow the operative words of the decree, by which marriages are declared to be null, unless the conditions therein specified be complied with, which conditions being satisfied, a marriage is by construction valid, notwithstanding that in other respects the decree may be disregarded: "Qui aliter, quam præsentem parochum, vel alium sacerdotem de ipsius parochi seu ordinarii licentiâ, et duobus vel tribus testibus, matrimonium contrahere attentabunt eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit prout eos præsentem decreto irritos facit et annullat."

The decree then imposes penalties upon persons taking part in any such contract where the clergyman and the

proper number of witnesses are not present. It exhorts married persons not to cohabit before receiving the priestly benediction in church (*in templo*), which blessing only the *parochus*, or a person licensed thereto by him, or by the ordinary, is to give. It forbids the clergyman to marry persons without the consent of the *parochus*. It directs the keeping of a marriage register. It exhorts the parties before they contract marriage, or at least three days before consummation, to confess and receive the Sacrament. And it earnestly recommends (*vehementer optat*) the continuance of the laudable customs and ceremonies then used in any province, in addition to those which are thereby prescribed. The chapter relating to this subject gives directions for its promulgation in each parish, and concludes by enacting that it shall come into force thirty days after such publication.

Upon the construction of this decree, it has been holden that, provided the marriage takes place *per verba de præsenti*, in the presence of the *parochus* and two witnesses, though the priest take no part in the ceremony, and even dissent from and reluct against it, the terms of the decree are satisfied, and the marriage is valid.

This is the result of the passages which were referred to in the argument from *Sanchez de Matrimoniis* and *Zallinger's Institutiones Juris Ecclesiastici*.

To the same effect is the passage cited in argument and referred to, with approbation, in the judgment of the present Lord Chancellor, in *The Queen v. Millis* (m), which clearly expounds the scope and intention of the decree, and the office of the priest thereunder. “*Fernando Walter*, now a professor in the University of Bonn, in his *Treatise on the Canon Law*, a work highly es-

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teemed on the continent of *Europe*, speaking of the decree of the Council of *Trent* on this subject, said that the provision is new that both parties must declare their intention before their parochial minister, and, at least, before two witnesses; this form is declared so essential, that if it is not observed, the marriage is altogether void; but yet the object is only to secure a *trustworthy witness*, in order to the ascertaining of the marriage; wherefore the presence of the witnesses mentioned need not have been expressly invited; nay, even the opposition of the parochial minister does not prevent the validity of the marriage, if the parties have merely heard the declaration. He goes on to explain the difference between a regular marriage before a priest and a clandestine marriage without a priest, but considers them equally effectual. He says, ‘Marriage is a contract which ought, according to the ancient usage, to be solemnized by the priestly benediction; and, in this benediction, this ought to be given by the proper parochial minister, or some one authorised by him according to the laws of the Church. Other ceremonies are also to be observed. None of all this, however, is essential to the validity of the marriage.’ The decree of the Council of *Trent* respecting the solemnization of marriage requires the presence of the parish priest, or some other priest specially appointed by him or the bishop; but, even under the new decree, the priest is present merely as a witness; it is not necessary that he should perform any religious ceremony, or in any way join in the solemnity.”

This law was acted upon in *Herbert v. Herbert*.

Now we must observe that, although the decrees of the Council of *Trent*, and the decisions upon its construction, are in no respect authority in this country, yet, s

proceeded upon any principle generally recognised
istendom, we should be prepared to consider them
attention, as guides in any obscure and difficult
So far, however, as the construction of that decree
canonists depends upon its form and language,
construction can here give us no assistance.

appears to us that the construction put upon the
turned upon the terms of the nullifying words
we have already pointed out as forming the keystone
enactments. Such construction could not have
ded upon any doubt as to the power of the church
ke the prescribed ceremony, or the active inter-
n of the priest, essential to the validity of a mar-
because the absolute control of the church over
elation was laid down in the twelve canons imme-
preceding the decree, even to the extent of en-
her by Canon 3 to create new prohibited de-
and to dispense with such prohibitions; and, by
1 4, to constitute "*Impedimenta matrimonium*
ntia."

reover, we must observe that if the decree, and the
rities upon its construction, establish anything, it is
here must be three witnesses to a marriage, and
one of those witnesses must be the priest. If the
ch of *Rome* were to-morrow to change her views as
celibacy of the clergy, and to revoke the ninth
of the Council of *Trent*, and the decrees of the
cils of *Lateran*, annulling the marriages of the clergy,
decree of the Council of *Trent* in other respects re-
ng in force, and the question were to arise, whether
riest could take a wife in the presence of two lay
esses only, he himself acting the double part of hus-
and clerical witness, it might well be thought that
ecree was not complied with, because it obviously

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contemplates three witnesses, one of whom is to be the *parochus*, or another priest appointed by him or the bishop. That case would nearly resemble the present. Those which have actually occurred, when attentively considered, do not appear to us to approach it.

This will still further appear when we call attention to what is equally relevant as the decree of the Council of *Trent*, namely, the legislation which took place in *France* soon after that council, and the very different construction which that legislation received.

The laws of *Charlemagne* and his successors had at that time fallen into desuetude and oblivion (6 *Pothier*, 156), a state theoretically impossible in our more positive institutions. The decree of the Council of *Trent*, notwithstanding the efforts of the pope and the clergy, was, for political reasons, not received into *France*. The example which it set was, however, soon followed there. The 40th article of the ordonnance of *Blois*, in the time of *Hen. III.* (King of *France*, 1574 to 1589), enacts as follows: “Avons ordonné que nos sujets ne pourront valablement contracter mariage sans proclamations précédentes; après lesquels bans, seront épousés publiquement; et pour témoigner de la forme, y assisteront quatre témoins dignes de foi, dont sera fait registre, etc.”

This was followed by an edict of *Hen. IV.* (A. D. 1606), which declared that marriages which were not made and celebrated in the church, and with the solemnities required by the ordonnance of *Blois*, should be null and void. Then came the declaration of *Louis XIII.*, 1639, art. 1, which ordained that the ordonnance of *Blois* should be strictly observed, and that, in its interpretation, it should be deemed that there must be present four witnesses, with the parish priest, who was to receive the consent of the parties, and marry them, “qui recevra le consentement

rties, et les conjoindra en mariage, suivant la forme
uée en l'Eglise."

se laws were interpretated to mean, that the priest
ot only have been present, but must have taken
ive part, must have consented to marry, and have
d the parties, in order to make a valid marriage.

e présence du curé requise par nos lois pour la validité
riages, n'est pas une présence purement passive ;
n fait et un ministère du curé qui doit recevoir le
tement des parties, et leur donner la bénédiction nup-

Cela résulte des termes de la déclaration de 1639,
us rapportée, où il est dit que le curé recevra le
itement des parties, et les conjoindra en mariage,
t la forme pratiquée en l'Eglise. Il ne suffirait
pas, pour la validité du mariage, que les parties
nt trouver à l'Eglise leur curé, et qu'ils lui déclat
t qu'ils se prennent pour mari et femme ; il faut
e curé célèbre le mariage."

hier adds, in explanation of why the clergyman was
nsidered by the law of *France* a simple witness, but
ring an active duty to perform in marrying the par-
353): "Ce que nous avons dit, 'que le prêtre qui
e le mariage n'est pas un simple témoin, et qu'il
rce un ministère,' n'est pas contraire à ce que les
giens enseignent, 'que les parties qui contractent
ge sont elles-mêmes les ministres du sacrement de
ge.' Il est vrai qu'elles en sont les ministres quant
ui est de la substance, et qu'elles se l'administrent
roquement par leur consentement, et la déclaration
ieure qu'elles se font de ce consentement ; mais le
e est, de son côté, le ministre des solennités que
ise et le Prince ont jugé à propos d'ajouter au
ge pour sa validité, et il est préposé par l'Eglise et
e Prince pour exercer ce ministère."

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Such was the state of the law of marriage in *France* up to the time of *Pothier*; and in this discussion it makes an equipoise with the Council of *Trent*.

It is not necessary that we should notice the more modern laws by which marriage is treated purely as a civil contract, and required to be in a prescribed form. The validity of a marriage under such laws must depend upon the express language of the legislator. We may, under this head, class the case in 1807, cited from the "*Causes Célèbres*," vol. 1, p. 295, and that referred to in the annotated edition of the Code Civil, by M. *Gilbert*, Law 165, n. 11, from which we have not derived much assistance.

It remains to make some more particular remarks upon our own law and practice. In doing so, it would be a useless task to pass in review the cases cited in argument, and all of which, with the exception of *Maxwell v. Maxwell* (o), and *Legeyt v. O'Brien* (p), before a very learned Judge, the late Dr. *Radcliff*, and *Harrod v. Harrod*, before Vice-Chancellor *Wood* (A. D. 1855) (q), were stated, marshalled, and criticised in the case of *The Queen v. Millis*. A comparison of the judgment of Lord *Lyndhurst* and that of the present Lord Chancellor will supply all that can be said on this part of the subject. As to those authorities, however weighty they may be, which, in *The Queen v. Millis*, were, in the result, disregarded, it would be useless to cite them again. With respect to those which it left untouched, they may be considered as showing that, notwithstanding some early decisions, it had come to be considered as law, that, before Lord *Hardwicke's* Act, a marriage might be valid, though it departed from the rubric in respect of being celebrated in a private house instead of the Church;

(o) Milw. Ecc. Rep. (Ir.) 290, A.D. 1832.

(p) Id. 225, A.D., 1834.

(q) 18 Jur. 853; 1 Kay & Jo. 4.

with no witness other than the clergyman, instead of in the face of the congregation; with no person to give the bride away; without banns or a license; without the use of a ring; without the repetition of the whole service; provided only that the parties took one another for man and wife by words in the present tense before a priest, or since the Reformation, for the reasons explained by Lord *Lyndhurst* in *The Queen v. Millis*, a deacon. There is not, however, any authority in our law, of which we are aware, that if the clergyman refused to receive the consent, or allow of the marriage taking place in his presence, the parties could, in spite of him, take advantage of his being present to marry one another.

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That was the link which the argument for the Plaintiff below sought to supply, by urging that as all the duties imposed by law upon the clergyman might be neglected without invalidating the marriage, therefore the consideration that the proposed husband, as being an interested party, was not likely to perform those duties with impartiality or effect, was immaterial; and that the rubric might also be disregarded or modified, in so far as it contemplates that the officiating minister shall be a third person.

This leads us to consider what is the essential part of the marriage service. It seems probable that the service in the Prayer Book is substantially the same as that which was in use for more than two centuries before the Reformation, so far as the end of the address to the people following the formula, "I, *M.*, take thee, *N.*," &c., and "I *N.*, take thee, *M.*," &c. Whether any part of it was in use before the 13th century is a question upon which historians are not agreed.

Doctor *Lingard* (Anglo Saxon Church, vol. 2, pp. 9 and 10), states that in early times no form of words was

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used at the nuptials, and that there was no express contract of marriage at the ceremony, of which he gives a detail (much to the effect of one of those in *Selden, Uxor Ebraica*, book 2, chapter 27, without the words of the marriage ceremony); but that the consent of the parties was only signified by the giving and receiving of the ring at the church door in the presence of the priest, who blessed it, and by afterwards attending in the church the celebration of the Eucharist, during which the nuptial benediction was pronounced. He states that there is no trace of any form of marriage contract in ancient sacramentaries previous to the close of the twelfth century; and that the earliest mention of any form is in the constitutions of the two *English* prelates already mentioned, *Richard Poere*, or *Poore*, Bishop of *Salisbury* (A.D. 1217 to 1228), and *Richard de Marisco*, Bishop of *Durham* during the same period.

Sir *Francis Palgrave* ("Rise and Progress of the Commonwealth," part 2, p. cxxxv.), however, concludes, from the peculiar language, rhythmical form, and general use of the *verba de præsenti*, that they represent an *Anglo-Saxon* oath, in use before Christian times, as the civil ceremony of marriage, to which the Church has since added the blessing; and that, "notwithstanding the labours of *Augustin*, it is to be suspected that the ancient wedding form is yet retained in our ritual, where the wife is taken 'to have and to hold,' " &c.

The oldest known forms of the *English* marriage service, according to the uses of *Salisbury* and *York*, which agreed in substance but differed in detail, will be found at large in *Selden*, "Uxor Ebraica," book 2, chapter 27, 2d vol. of works (3d if bound in 6 vols), column 676; and those parts of the rituals from which the present service was composed will be found in a convenient arrangement, side

by side with it, in a modern work, 2 *Palmer's* "Origines Liturgicæ," page 212. The double form of consent is explained by the fact, that the early part of the service, from the preface or banns to where the woman says "I will," consists of the espousals, which formerly used to take place some time before the day of the solemnization of the marriage. In the introductory part of the ceremony the expression which in the Prayer Book stands thus: "Dearly beloved, we are gathered together here in the sight of God, and in the face of this congregation, to join, &c.," stands in the ancient form, "coram Deo, angelis, et omnibus sanctis ejus, *in facie ecclesiæ*, ad conjungendum," &c.

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This form of banns (banna) was to be spoken in the mother tongue, and it admonished, as in the present form, any one who might know of cause or just impediment to declare it.

Then followed a similar admonition to the man and woman, the terms of which are remarkable, as even more distinctly than the present form indicating a discretionary power in the minister to prevent an improper marriage. "Also I charge you both, and eyther be yourselfe as ye wyll answer before God at the day of dome, that yf there be any thyng done pryvely or openly betwene yourselfe, or that you know any lawful lettyng why that ye may not be wedded togyder at thys tyme, say it now, *or we do any more to this matter.*"

Then follows a rubric in the terms of that in the Prayer Book, directing that if any one puts forward a just impediment, and gives security to prove it, "et ad hoc probandum cautionem præstiterit, differantur sponsalia quousque rei veritas cognoscatur."

The questions are then put, to which the man and woman answer, "I will," and so end the espousals.

The ancient form proceeds to direct that the woman be

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given away by her father or friends, and that her husband shall plight her his troth "*per verba de præsenti*," saying after the priest.

The most remarkable difference between the intermediate and more modern forms of those "*verba de præsenti*" is in the substitution of the words "according to God's holy ordinance" for the words, "if holy Chyrche it wol (or wel) ordeyne." These latter words are considered by Sir *Francis Palgrave* to have been added in early Christian times to the formula, which, in his opinion claims a more remote antiquity.

This, the most significant portion of the marriage service, stood as follows in the ancient rituals: "Deinde detur foemina a patre suo, vel ab amicis ejus. Vir eam recipiat in Dei fide, et suâ servandam, sicut vovit coram sacerdote, et teneat eam per manum suam dexteram in manû suâ dexterâ, et sic det fidem mulieri per verba de præsenti, ita dicens docente sacerdote—'I, *M.*, take the, *N.*, to my wedded wyf, to have and to hold, fro this day forwarde [at bedde and at borde, for fairer for fouler(*r*)], for bettere for wors, for richere for porere, in sicknesse and in hele: till death us departe [if holy Church it wol (or wel) ordeyne (*s*)], and thereto I plight the my trouthe.' Manum retrahendo. Deinde dicat mulier docente sacerdote, 'I, *N.*, take the, *M.*, to my wedded husbonde, to have and to hold fro this day forward, for better for wors, for richer for porere, in syknesse and in hele, to be bonere and buxome (biegsam, obedient), in bedde and at borde, tyll dethe us departe, if holy Church it woll (or well) ordeyne, and therto I plight the my trouthe.'"

Then followed the giving of the ring, and the blessing thereof.

(*r*) York use.

(*s*) Not in York form.

Anciently up to this point the marriage was celebrated at the door of the church, "*ad ostium ecclesiæ*." The parties then entered the church, and after the thanksgiving and prayer the eucharist was celebrated, and the solemn benediction was given.

That part of the service in which the minister joins the right hands of the parties together, and says, "those whom God hath joined together let no man put asunder," is ancient, and it is stated by Mr. *Palmer* to be perhaps peculiar to the Church of *England*. It is observable that the authors of this form appear to have carefully avoided the style "*ego vos conjungo*," adopted at the Council of *Trent*.

The address to the people which follows, contains an explanation of the preceding service, and points out the distinction between that which is essential, and that which is only declaratory or formal; and with it we may conclude our citations from the Book of Common Prayer, "*Here the minister shall say unto the people* (of whom before 1754 there need have been none), forasmuch as *M. and N. have consented together in holy wedlock*, and *we* witnessed the same before God and this company, and thereto have given and pledged their troth, either to *other*, and have *declared* the same by giving and receiving of *a* ring [and of gold and silver], and by joining of hands, *I pronounce* that they be man and wife together, in the name," &c.

This is almost word for word taken from the ancient Latin Form, *Selden*, *Uxor Ebraica*, book 2, c. 27, v. 2, col. 683.

If it be our duty to answer a question raised during the argument, and to say at what part of the service the marriage is knit for civil purposes, we answer, in the words of the 39th section of *Littleton*, "after affiance and

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troth plighted between them." This period before the solemn nuptial benediction which was afterwards pronounced inside the church, was that at which dower "*ad ostium ecclesiæ*" might have been assigned; and according to the commentary, *Co. Littleton*, 34a, that could, by the better opinion, only have been assigned "after marriage solemnized." The subsequent giving of the ring, and joining of hands, and publication of the fact of marriage by the minister, are in their nature, and are stated to be, symbolical and declaratory of a marriage which has already taken place by the consent of the parties. The blessing is as of persons who have already consented together in wedlock, and anciently, as well in *England* as abroad, the nuptial benediction was given only at a first marriage; *Selden, ubi supra*, col. 678. The rest of the service consists of thanksgiving, exhortation, and prayer.

Lest, however, there should by possibility any mischief result from our expressing this opinion, we must protest against its being supposed to be, in our view, either wise or right to leave out any part of the service.

The Rubric gives directions with reference to marriages by banns only, and therefore must be capable of modification to suit the case of marriage by license. This may explain why those circumstances which were to accompany a marriage by banns, but which might be dispensed with in the case of a marriage by special license, amongst others, celebration in a church by the minister of the parish, in the presence of the congregation, had, before the Marriage Act, come to be considered as non-essential, the want of a dispensation for such purpose having been before Lord *Hardwicke's* Act treated as an offence against the ordinary, and, therefore, only as an irregularity. The want of a person to give

he bride is not visited by the Rubric or by the law with any consequences. The omission of giving of the ring, and the subsequent part of the ceremony, may, for reasons already given, be considered as purposes non-essential. An omission by the minister to give the proper warning would be his fault, as the Rubric does not profess to visit that upon the

These considerations may explain in what manner, conformably with *The Queen v. Millis*, the decisions and dicta on the validity of irregular marriages, which have departed in those several respects from the prescribed and prescribed forms, may still be law, may still be considered as legitimate applications of the rule which seems to pervade the law of marriage, viz., that directions in the manner, and even prohibition under a penalty rather than nullity, do not necessarily imply nullity; as acted upon since *The Queen v. Millis*, in *Catterall v. Catterall* (t).

The Rubric, explained and confirmed as it is, cannot, however, hardly mislead us as to the duties of the minister, who, it appears, must be present, or as to the character in which he attends; and it abundantly indicates that the duties are other than those of a mere bystander, that the character in which the minister attends is not that of a witness to the contract, but that of a minister entrusted with the duty of preventing the marriage from taking place, if a just impediment be brought to his knowledge. The evidence of such an impediment is left to the knowledge of the minister himself, to the conscience of the parties, and to the unen-

See Robertson, 580. In the report of this case in Robertson, a passage seems to have been omitted by mistake, in the second page of the judgment, p. 582, l. 9.

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forced interference of third persons. The parties are not made answerable for the performance of the minister's duty at the penalty of their marriage; but the duty exists, and its character is such that the person to perform it ought to be one other than either of the interested parties.

Had the case been *res nova*, we might have thought that the law of *Edmund*, the Rubric, and other indications that by the law of *England* a priest was to be present at a marriage, were but reflections of the general law of the Church, by which, from the earliest times, the intervention of a priest had been inculcated, and from time to time enforced by penalties, though never before the Council of *Trent*, by nullifying the marriage at which no priest assisted.

That view was presented and considered in *The Queen v. Millis*, and it raised a question worthy of all the zeal, learning, and genius which it called forth; but that view was not adopted in the result, and it is not competent for us to restore it. It is to be assumed, for the purpose of to-day, that *England*, from time immemorial, divided from the Church, held the presence of a priest to be essential. And whatever hardship such a law may, in the course of years, have wrought to dissenting bodies, and also to British subjects in the colonies and in foreign countries, where no priest could be procured, if the law was ever rightly held to apply under such circumstances (*u*), as to which we say nothing; those hardships (now mitigated by numerous statutes passed before and since the decision in *The Queen v. Millis*) were very unlikely to have been foreseen at the time when the law,

(*u*) Compare *Catherwood v. Caslon*, 13 Meeson & Welsby, 264, *Catterall v. Simpson*, 1 Robertson, 304, and *Catterall v. Catterall*, id. 580; and see *Maclean v. Cristab*, Perry's Oriental Cases, 75.

assumed to exist, must have been established. It cannot with justice be said, that at that time it was either an unintelligible or irrational law, nor that the objects which it had in view, namely, the prevention of unlawful marriages, and the preservation of evidence of those which should take place, besides the addition of a religious sanction to the duties which spring from the relation of man and wife, are either obscure or even less important at the present moment than they were ten centuries ago.

The law assumed to exist appears to us, for the reasons which we have stated, to require, that, equally in the case of the clergy as of the laity, marriage in this country should (in the absence of express statute), take place in the presence and with the assent of a clerk in holy orders, who must be a third person, and whose duty it is to prevent or put off the marriage if there be opposed a just impediment; and who, in case he allows of its proceeding, is then, in the primary sense of the word, to marry the parties by receiving their mutual consent to become man and wife.

If just exception be made to the length at which we have stated our unanimous opinion, and the reasons upon which it is founded, our excuse must be looked for in the unaccustomed nature of the case, and the grave importance of the general subject; nor are we ashamed to own that our minds fluctuated during the discussion, and that we deliberated with more than ordinary anxiety and caution, before we felt constrained to be of opinion, that the act of competent persons who in fact contracted with one another to become man and wife, by a ceremony as binding upon them in conscience (with reverence be it spoken) as if an archbishop had pronounced the blessing, was, for reasons which still affect the security of titles, and the peace of families, unavailing in point of law.

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We, that is to say, my brothers *Byles* and *Hill*, and myself, being the only Judges who were present during the whole of the argument, thus answer the question in the negative.

The Lord Chancellor (Lord *Campbell*) after stating the facts of the case, said :—

April 22.

This appeal in two preceding sessions was most elaborately and learnedly argued on both sides at your Lordships' bar before the *English* judges, who were summoned to assist your Lordships with their advice, and who have favoured us with an opinion which displays extraordinary research, and will hereafter be considered a repertory of all the learning to be found in any language upon this important subject.

My Lords, had the present case been brought here by writ of error previously to the decision of this House in the year in 1844, in the case of *The Queen v. Millis* (v), I should not have hesitated in advising your Lordships to affirm the judgment in favour of the validity of the marriage and the legitimacy of the Respondent. The special verdict sets out a proved contract of marriage *per verba de præsenti*, intended and believed by the parties to make them husband and wife without any farther ceremony. The effect of such a contract would have depended on the common law of *England* respecting the constitution of marriage before Lord *Hardwicke's* Act, which passed in the year 1753 ; and, according to this law, I should have said, without any regard being had to the fact of the husband being a priest episcopally ordained, this was *ipsum matrimonium*, conferring on the parties, and insuring to their children, all the civil rights flowing from a valid

marriage. Without the intervention or presence of any priest such a contract certainly amounted to an indissoluble and perfect marriage by the canon law, which was understood to have so far been adopted and acted upon by all the countries belonging to the Western Church, till it was modified by the decree of the Council of *Trent*, requiring, on pain of nullity, that at the celebration of the marriage there should be present the parish priest, or the bishop of the diocese, or a priest appointed to represent one of them. So strongly was the maxim, "*consensus facit matrimonium*," understood to be the universal law in Christendom, that a large minority of the bishops assembled in the Council of *Trent* protested against the power of the Church to alter it, and the old canon law was still in force in every Roman Catholic state in which the decree of the Council of *Trent* has not been received. *England*, having been for so many ages after the coming of *St. Augustin* under the spiritual dominion of the pope, marriage, as a sacrament, was considered a matter of spiritual jurisdiction, on which there was an appeal from the Ecclesiastical Courts of *England* to the pope.

By the research of the Judges, whom we have recently consulted, instances have been discovered of this mode of proceeding with respect to the validity of *English* marriages as early as the pontificate of Pope *Alexander III.*, between the years 1159 and 1181, in which the validity of such marriages by a contract *per verba de presenti*, without the presence of a priest, was decreed by his holiness; and we know from the case of *Hen. VIII.* himself, that such appeals were conducted according to familiarly recognised procedure down to the time of the Reformation. It would have seemed very strange, therefore, if, in *England* this sacrament had been governed by

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peculiar rules unknown to the Western Church and its supreme head.

But we had the authority of Lord *Stowell*, one of the greatest of jurists, that, till Lord *Hardwicke's* Act, the canon law was the law of *England* respecting the constitution of marriage, and the same doctrine had been sanctioned by a long succession of our most distinguished common law judges, Lord *Hale*, Lord *Holt*, Lord *Kenyon*, Lord *Ellenborough*, Lord Chief Justice *Gibbs*, and Lord *Tenterden*.

However, it must now be considered as having been determined by this House, that there could never have been a valid marriage in *England* before the Reformation without the presence of a priest episcopally ordained, or afterwards, without the presence of a priest or of a deacon.

The chief ground of this decision was the ordinance of a *Saxon* king in the year 940, requiring that "at nuptials there shall be a mass priest, who shall by God's blessing bind their union" (*w*). This, if nullifying all marriages not so solemnised, seems to nullify marriages by a deacon, who is not a "mass priest" more than the sexton. Many other admonitions may be found against irregular and clandestine marriages. The Church, no doubt, wished that marriages should be solemnised *in facie ecclesiæ*, and that a priest should be present for the laudable purpose of seeing that the parties to be married were not within the prohibited degrees, and that banns had been proclaimed, or a proper license, with the consent of parents and guardians, had been obtained from the ordinary; and the Church farther wished that, on this auspicious occasion, a priest should attend to exhort the faithful to testify, by a liberal contribution, the sense of their obligation to their

(*w*) The complete sentence is "their union to all prosperity."

ritual guides. But down to the decree of the Council of Trent, the canons on this subject were merely directory without any nullifying clause, and the marriage, though irregular and clandestine, was valid, if the contract was proved to have been solemnly entered into between the parties *per verba de præsenti*. Marriage was considered a sacrament; but, like baptism, and some other of the seven sacraments, it might be administered in cases of urgency without the intervention of a priest. Indeed, the decision of *The Queen v. Millis* allowed that the contract, *per verba de præsenti*, established between the parties indissolubly the relation of husband and wife, so much that if either of them married again, the second marriage was to be dissolved as bigamous and void, and the bigamist party might be ordained to celebrate marriage with the first and true spouse in the face of the church.

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My Lords, the decision in *The Queen v. Millis*, that unless a priest, especially ordained, was present at the marriage ceremony, the marriage was null and void for civil purposes, and the children of the marriage were illegitimate, seemed to me so unsatisfactory, that I deemed my duty to resort to the extraordinary proceeding of entering a protest against it on your Lordships' Journals.

This proceeded not from any approbation of the canon law with respect to the contract of marriage, or from any wish ever to see it restored. I consider it most unjust and tyrannical that an invariable form of celebrating a valid marriage should be indispensably required, any part of which is contrary to the religious feelings of any class in the community; but I have always been of opinion that to constitute this, the most important of all contracts in which society itself depends, there ought to be a public form of celebration to which no reasonable person can

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object, admitting, by means of registration, of easy, certain and perpetual proof; the addition of a religious solemnity being highly desirable, although not absolutely necessary. Nor do I at all yield to the objection that marriage, as a civil contract, may not properly be regulated by human laws. I deprecate the expression of parties being "married in the sight of God," if the marriage is not recognised by the law of the country in which they live. Of a person pretending to be so married, I say, "*Conjugium vocat, hoc prætexit nomine culpam.*" But I wished the old established law to be observed till it was constitutionally altered.

If it were competent to me, I would now ask your Lordships to reconsider the doctrine laid down in *The Queen v. Millis*, particularly as the judges who were then consulted, complained of being hurried into giving an opinion without due time for deliberation, and the Members of this House who heard the argument, and voted on the question, "That the judgment appealed against be reversed," were equally divided; so that the judgment which decided the marriage by a Presbyterian clergyman of a man and woman, who both belonged to his religious persuasion, who both believed that they were contracting lawful matrimony, who had lived together as husband and wife, and who had procreated children while so living together as husband and wife, to be a nullity, was only pronounced on the technical rule of your Lordships' House, that where, upon a division, the numbers are equal, *semper præsumitur pro negante*.

But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente*, and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and supreme Court of Appeal for

this empire, must be taken for law till altered by an Act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.

Assuming the law to be settled, that to constitute a valid marriage by the common law of *England*, there must have been present a clergyman in orders conferred by a bishop, the question now to be determined is, "Whether, the bridegroom being such a clergyman, and there being no other clergyman present, a valid marriage was contracted?"

It was argued, as a conclusive objection, that, the bridegroom officiating as clergyman, it would be utterly impossible for him to use the language of the marriage service in the Prayer Book, or to follow the directions of the Rubric respecting the opening address to the congregation; the adjuration to the couple about to be married, as to confessing any lawful impediment to their union; the demand, "Who giveth this woman away to be married to this man?" the putting on of the ring on the finger of the bride, and in pronouncing the benediction. But none of these is absolutely essential to the validity of the marriage, although very fit to be strictly observed; and marriages have been held to be valid where each of these parts of the service has been omitted, the essential part of the service being the reciprocal taking each other for wedded wife and wedded husband till parted by death, and having joined hands, being declared married persons.

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It is nowhere said what are the functions to be performed by the priest, who must be present. But even if it were held that, according to the *English* nullifying law, declared in *The Queen v. Millis* (as it has been held in construing the nullifying decree of the Council of Trent, in *Herbert v. Herbert*, and other cases), that it is a sufficient compliance with the law if a priest be bodily present, although against his will, and although he take no part in the ceremony, the bodily presence of the priest while the marriage is celebrated is, at all events, indispensable.

Thus, if the bridegroom be a layman, the presence of three persons is indispensable. If the bridegroom be a priest in orders, can the presence of two persons, the bridegroom and the bride, be sufficient?

I think that the consulted Judges show clearly, that, in the early ages of Christianity, before the celibacy of the clergy was enforced, as well as since the Reformation, when marriage has been permitted to them, no difference has been made between the clergy and laymen as to the manner in which the marriage is to be celebrated. If the priest, who is now required to be present at the marriage, has not power authoritatively to see that there is no lawful impediment to the parties being joined in lawful wedlock, and it is not meant that for reasonable cause he should prevent the marriage from proceeding, at the very least he is required to be present as a witness; and the law may be laid down as established by *The Queen v. Millis*, that a man and woman cannot be lawfully married except in the presence of a priest as a witness.

By a deed creating a power, the power is to be executed by the donee of the power in the presence of a credible witness. Can the donee witness his own act in

ing the power? A will is to be signed by the
in presence of two witnesses; can he himself be
and testator? I am bound to say, certainly

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is no doubt the Royal phrase is, *Teste meipso*;
is autocratical language, asserting, that the
quires no witness, and is binding by the sole sig-
of the Royal grantor.

tion is made, that if one person may not be both
om and priest, it would be impossible for a
an to pronounce the marriage benediction on his
ghter; but I conceive that a third person might
part of giver away of the bride, her father being
iating priest; and at any rate, there is as yet no
nullification of a marriage on the ground of the
mission of this part of the ceremony.

not think it necessary to reason more at large a
hich seems to me so clearly and undoubtedly to
rom the prior decision of this House in *The Queen*
s.

I must notice two manuscript cases which have
ted to prove that a clergyman may marry himself.
ceedings in both have been fully laid before us,
ave carefully considered them.

first is *Goole v. Hudson*, in the Court of Arches in
The libel was by a clergyman against the daughter
of his parishioners, whom he had induced, in the
f her mother, to go through with him, whilst they
one, a form of marriage by their saying, that they
e another for man and wife, according to the form
marriage service in the Prayer Book, and by the
a ring, with the words, "With this ring I thee
ec., omitting the other parts of the service. The
of the libel was, that a subsequent marriage con-

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tracted by her *in facie Ecclesiæ* with one *Boyce* should be declared void, and that the Proponent and Respondent should be declared man and wife, and that she should be compelled to solemnise matrimony with him *juxta exigentiam*. The answer of the Respondent admitted that the alleged ceremony had taken place, stating that it was only in jest, and she admitted that she afterwards had written letters to him which she subscribed “spouse,” but at his request. Evidence being taken the Court decided that the parties did enter into and celebrate between themselves, on the 16th of *June* 1731, a true and lawful matrimonial contract, &c., and pronounced the validity of the matrimonial contract and espousals entered into, and pronounced the marriage with *Boyce* to be null, and that the Respondent ought to be compelled by law to solemnise a true, pure, and lawful marriage in the face of the Church with the Proponent, and admonished her so to do.

It must be observed, however, that not only was this case long before *The Queen v. Millis* first laying down the doctrine, that there can be no valid marriage without the presence of a priest in orders, and that there does not seem to have been any weight attached to the fact that the Proponent was a priest in orders, but the Proponent, by praying for a subsequent celebration of marriage with the Respondent, himself treated the former ceremony as an executory pre-contract, intended to be followed up by a subsequent solemnization in the face of the church.

It must be recollected that such suits, founded on a precontract, might be instituted in *England* till the *Hardwicke’s* Act in 1753, and that they were not permitted to in *Ireland* till the year 1818.

Accordingly, in the other case relied upon, *Holmes v. Holmes*, the suit was instituted in the Consistorial Court of the Diocese of London.

in *Dublin* by the lady, first for a restitution of conjugal rights, which seemingly by consent was dismissed without prejudice. She then sued according to the form in *Goole v. Hudson*, alleging that the Respondent, a clergyman in holy orders, had, in a private house, gone through the celebration of matrimony with her in all respects according to the Rubric in the Book of Common Prayer, except that no ring was used, and that the ceremony was preceded and followed by cohabitation; she therefore prayed that the Respondent should be decreed to celebrate marriage with her in the face of the church. The Respondent answered, that he never promised or intended to marry the Promovent, but admitted that being in her power, and moved by her importunity and threats, and in order to avoid exposure, he had on the occasion alleged, read portions of the marriage service, but not the whole thereof, and not as a celebration of his marriage, but in order that she might obtain a more solemn promise or contract than she had before obtained.

Evidence being taken, the Court decided that the parties had made a valid matrimonial contract, and ordered that a lawful marriage should be celebrated between them by a priest in holy orders of the church, according to the rules, ceremonies, and canons thereof, and enjoined both parties to enter into and cause the said marriage to be solemnized *in facie Ecclesiae*.

Here again the first ceremony was treated by the Promovent as a precontract only. No reliance seems to have been placed upon the fact of the Respondent being a priest in orders, and in all probability the same sentence would have been pronounced if he had been a layman.

These are the only cases to be found in which, in a dispute respecting a matrimonial contract, the alleged husband was a priest in orders; and neither of them can be

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cited as authority to show that the necessity for the presence of a priest in orders being established, the same one individual can represent the two characters of bridegroom and priest, who are both to be on the scene at the same time.

Therefore, my Lords, I can neither find principle nor authority to support the judgment appealed against. It is always exceedingly disagreeable to me to advise your Lordships to reverse any judgment, and I feel peculiar reluctance to do so where the judgment in a case of this sort is in favour of legitimacy ; but being of opinion, after much deliberation, that this judgment cannot stand with your Lordships' decision in *The Queen v. Millis*, I must not only in discharge of my duty, according to your Lordships' standing order, as speaker, put the question, "That the judgment be reversed," but if there be a division, I must for myself say "Content."

Lord *Cranworth* :

My Lords, like my noble and learned friend, I assume in the consideration of this case that the decision of your Lordships' House in *The Queen v. Millis* must be taken as settled law. I was one of the Judges who assisted your Lordships in the hearing of that difficult and doubtful case. I concurred in the opinion then delivered by Chief Justice *Tindal*, on behalf of all the Judges, nor have I since seen adequate reason for satisfying me that that opinion was erroneous. I do not think it necessary, however, to canvass or discuss the propriety of the decision at which the House then arrived. I assume, and am bound to assume, that case to have been correctly decided.

The language of the *Chief Justice* in delivering the opinion of the Judges is, that "a contract of marriage *per*

de præsenti never constituted a full and complete
 ge in itself, unless made in the presence and with
 intervention of a minister in holy orders." These
 very words of Chief Justice *Tindal*, and if they
 construed according to their strict sense, they cer-
 require in terms the presence, in all cases, of a
 er in holy orders besides the persons entering into
 ntract. For it would be a solecism to say that con-
 g parties make a contract in the presence of them-
 or in the presence of one of themselves. Accord-
 the language of Chief Justice *Tindal*, the man and
 oman must make the contract in the presence of a
 er in holy orders. Now even supposing that by a
 of language the woman could be said to make the
 ct in the presence of the man with whom she is con-
 g, it could not possibly be said that the man makes
 ntract with the woman in his own presence. There
 be no sense in such a statement.

is, however, but just to say that the language of
 Justice *Tindal* was used with reference to the case
 before the House, and only for the purpose of de-
 g the opinion of the Judges, that without the pre-
 and intervention of a minister in holy orders no mar-
 would be valid. It would be making an unwar-
 le use of the expressions adopted to infer from
 that they were intended to have any bearing on
 n anomalous case as that now before the House.

still the conclusion at which I have arrived is the
 as it would have been if I had only to interpret
 y the language I have referred to; I think it clear
 ie minister whose presence is, according to the law
 shed in *The Queen v. Millis*, necessary in order to
 ute a valid marriage, must be a third person, not
 the contracting parties.

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what were the objects for which the presence of a minister of religion was required in order to give validity to a contract of marriage, was it merely that he should pronounce a nuptial benediction? Was it that he might be a trustworthy witness, in after time, of the fact of the marriage? or had he functions of a more active character? Was his presence required in order that he might witness marriages between persons who could not rightfully enter into the marriage contract, as where there had been a prior marriage or a precontract, or where the parties were within the degrees of consanguinity or affinity in which marriages were prohibited by the Church?

I do not propose to repeat the able reasoning which is found in the dissenting opinion of the Judges. I content myself by saying that I am satisfied, by that reasoning, that the presence of the minister is not required merely for the purpose of securing religious sanction to the contract. Though, even if it had been the only object of the law, I am by no means inclined to think that I should have come to a different conclusion from that at which I had arrived. The presence of the minister, as a priest originally, and afterwards of a minister of the Gospel, was, in my opinion, required, partly because it was essential to have trustworthy proof of the celebration of the marriage, and partly because the priest or minister might, if he was aware of any lawful impediment to the marriage, prevent its celebration. The narrowness

allied by kinship, The inference seems to me irrelevant that it was to be the duty of the mass-priest to do this so far as it might be in his power, and, as is set out in the opinion of the Judges, the same, or nearly similar rule, prevailed under the laws of *Charles* in *France*, no doubt for a similar reason.

Being then, as I am, convinced that the priest or minister required to be present in order that he may, ever afterwards, be a trustworthy witness to its celebration, and that, necessary, he may, so far as it is in his power, prevent the celebration of an unlawful marriage, it follows, of necessity, that he cannot be one of the parties entering into the contract. It would be absurd to suppose that a law which requires the presence of a person whose duty it may be to prevent, or endeavour to prevent, the making of a particular contract, can be satisfied by the presence of a person who is himself one of the parties

to such consideration seems to me decisive, and I feel that it might only be weakening the argument so ably employed in the opinion of the Judges, if I were to say

either of the two manuscript cases, *Goole v. Hudson* or *Holmes v. Holmes*, cited by the Respondent, bears out this argument. Indeed, both of them appear to me to militate against it. In both of them, it having been decided to the satisfaction of the court that the man, a minister in holy orders, had entered into a contract *verba de presenti* with the woman, whereby they bound themselves to become man and wife, the court decreed the contract to be valid, and that the parties ought to be compelled to solemnise marriage in the face of the Church. This, as it is noticed by the Judges, would be no more than would have been decided, if the

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parties had been laymen. The contract was held to be valid, and was to be completed by marriage *in facie Ecclesiæ*. This farther ceremony would have been unnecessary if the argument of the Respondent is sound.

Before I sit down I must advert to a matter glanced at by the Judges, namely, the question how far the decision of this House in *The Queen v. Millis* may be held to affect the marriage of British subjects in the colonies, or on board ship, where there may have been no minister of religion. I need not say that no such question as that arises here, but the subject having been adverted to, I wish to guard myself against its being supposed to be clear that the decision in *The Queen v. Millis* applies to the case of marriages of necessity entered into where the presence of a minister in holy orders may have been impossible. That question must be considered in this House as still open to be determined whenever it may arise.

I concur with my noble and learned friend in the conclusion at which he has arrived, namely, that the Plaintiff in error is entitled to our judgment.

Lord Wensleydale:

My Lords, I concur entirely in the advice given by my noble and learned friends, that in this case your Lordships should reverse the judgment of the *Irish* Court of Exchequer Chamber.

We have had the advantage of perusing the able and elaborate opinions of the eleven Judges who formed that Court, who were divided in the proportion of six to five; we have also had the assistance of very full arguments on both sides, by most able and learned counsel; and, above all, we have the great benefit of the advice of the three learned Judges who assisted the House in this case: Mr. Justice *Willes* delivering the opinion of himself, Mr.

Justice *Byles*, and Mr. Justice *Hill*. That opinion exhausts the whole subject, and contains an extent and variety of learning and information derived from *English* and foreign authors, rarely, if ever, equalled, and never, I believe, excelled; and that learning is distinctly classified, and is accompanied by most able and satisfactory judicial reasoning.

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If the case of *The Queen v. Millis*, of which we have heard so much, was now before us, to be reviewed on appeal, I am by no means sure that I should not agree in the opinion of my noble and learned friend on the woolsack. I was one of the Judges who concurred in the unanimous advice given to the House in that case, but I did so with considerable difficulty. I was anxious for farther time for consideration, but the argument having taken place on the eve of the long vacation, the case could not be disposed of during that Session if farther time had been allowed. The consideration I could give the case was, that, though I had very great doubt, I could not satisfy myself to give an opinion contrary to that of my colleagues, and therefore I yielded to it. I am not sure that I was the only one of the Judges in the same condition.

That question is not, however, now open for consideration. It has been finally and irrevocably settled by this House, though their Lordships, who gave their opinions, were equally divided, and the judgment of the Court of Queen's Bench, in *Ireland*, was thereon necessarily affirmed. But that judgment was conclusive only upon this point, viz., that by the common law of *England* and *Ireland*, a marriage celebrated between two parties without the presence of a clergyman in holy orders, was null and void; it was not merely irregular and censurable or mischievous, but absolutely void. But no more than this is decided, and the Courts below had, and your Lord-

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ships have now, the simple duty of applying that now established rule of law to the case of the marriage of such a clergyman himself with a female, no other clergyman being present.

It is to be observed that there is an inaccuracy in the expression of some of the Judges in the Court below, who state that the decision in *The Queen v. Millis* was, that the *intervention* of a clergyman in every marriage was required, as essential to the validity of every marriage. If that had been a part of the judgment of the House, the solution of the present question would not have presented the least difficulty, for the term *intervention* necessarily implies the presence of a third party. But that is only an expression in the opinion of the Judges, delivered by Chief Justice *Tindal*, and entitled only to the weight due to an opinion of eminent Judges. To speak with perfect accuracy, the decision of the House was only that a marriage between two parties without the presence of a clergyman, was invalid; but that rule, establishing the necessity of the presence of a clergyman, of itself seems to me to imply the same thing, that he must be a third person present at the contract; and the opinion of Chief Justice *Tindal* and the other Judges is an authority for giving that interpretation to the required presence of a clergyman.

The elaborate opinion of the consulted Judges which has been delivered to us by Mr. Justice *Willes*, gives very ample and satisfactory reasons why the presence of a third person, a clergyman, should be required. They suggest that there must be three reasons for requiring his presence: First, that it may be that he is to be a representative of the church, for the purpose of giving a religious character to the ceremony, and invoking from the Almighty a blessing on the union, for that is the

only sense in which a blessing can be given by human lips. Secondly, that he must be present, as a trustworthy witness to the contract, to see that the parties to it fully understand each other, that they really mean to contract and take each other from that time for husband and wife, and to bear witness thereafter to others to that fact. Thirdly, that he has a power to prevent the marriage from taking place, if a just impediment is brought to his knowledge, such as consanguinity, or affinity, within the prohibited degrees.

If the first reason was the only one which makes the presence of a clergyman so necessary to the validity of a marriage, the presence of a clergyman at his own marriage would be sufficient, for unquestionably he may invoke the blessing from the Almighty on himself and his wife, and in the Roman Catholic Church, where marriage is a sacrament, the parties may unquestionably administer the sacrament to each other.

But if either of the other two is the true reason why a clergyman should be present, the presence of a clergyman at his own marriage certainly cannot be sufficient. It would be irrational to intrust him with the authority to ascertain in his own case, whether he really meant to plight his troth to his intended wife, and whether he sufficiently made known that intent to her, and whether she intended also to contract. It would be irrational also to trust to him as the sole witness to testify to a marriage in which his interest would be deeply involved, and which he might affirm or deny afterwards according to his interest or pleasure; and it would be equally so to intrust him with the duty of deciding whether the marriage should take place, or not, in case a valid impediment to a lawful marriage should be suggested.

If either of the two latter reasons is that on which the

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now unquestionable doctrine is founded, that at common law a clergyman must be present in order to the validity of a marriage, I cannot have the least doubt that the marriage in question is clearly void. And if there is any question as to the last reason, which I do not think there is, I feel perfectly confident that there is none as to the second, that on the marriage of a clergyman, a third person, a clergyman, should be present as a witness, for the purposes above mentioned.

I do not think it necessary to make any observations on the two cases in the Arches Court and in the Consistory Court of *Dublin: Goole v. Hudson* and *Holmes v. Holmes*. They have been already explained by my noble and learned friend on the woolsack; they were cases of pre-contracts and not of marriage; the former case arose before Lord *Hardwicke's* Act in 1754, 26 *Geo.* 2, c. 33, which deprived such contracts of their effect in the Ecclesiastical Court to compel future marriages; and the latter case arose in *Ireland* before the year 1818.

My Lords, I am entirely satisfied with the reasons given by the consulted Judges, and by my noble and learned friends, and I have no difficulty in concurring in the reversal of the judgment.

With reference to the question whether the case of *The Queen v. Millis* would apply to marriages of British subjects in the colonies or on board ship where a clergyman cannot be obtained, I may observe that there was in the *Irish* courts, a question about the legitimacy of a person born after a marriage celebrated by the captain of a ship, and I think it was decided that that was not a valid marriage. I do not know whether Mr. *Butt* is acquainted with the case.

Mr. *Butt*: There was such a case I know, but I am

not prepared to say at this moment what the decision was. Perhaps I may be allowed to refer to the case decided in *India*, in which it was held that the case of *The Queen v. Millis*, did not apply to the case of a marriage in *India*, where no clergyman could be procured (*Macleay v. Cris- tall*, Per Oriental Cas. 75).

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Lord *Cranworth*: In this case at least the question is left open.

Lord *Chelmsford*:

My Lords, it is with very great reluctance that I agree with the opinions which have been expressed against the validity of the marriage in question. It is impossible not to feel for the situation of the Respondent, whose status is so seriously affected by the illegality of his parents' cohabitation. But with every desire to decide in a manner favourable to his social position and his worldly interests, I am compelled, after a careful examination of the case and a consideration of the able arguments which have been addressed to us on his behalf, to come to a different and unfavourable conclusion.

The whole question has been so thoroughly investigated in the arguments and opinions in the case of *The Queen v. Millis*, and the carefully considered and elaborate opinion pronounced by the learned Judges has thrown so much light upon the whole subject, that it would be an unwarrantable occupation of your Lordships' time if I were not to treat every part of the ground up to a certain point as entirely preoccupied. *The Queen v. Millis* must be taken to have settled that at common law a marriage was invalid unless contracted in the presence of a person in holy orders. As it is not satisfactory that a question of such importance should rest merely upon the result of an equal division of opi-

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nions in this House, I am glad to find that the researches of the Judges have brought to light additional proofs in favour of the correctness of the judgment which there prevailed. And I think it must now be admitted, that although, by the marriage law of Western *Europe* prior to the Council of *Trent*, a valid marriage might be contracted without the presence of a priest, yet that from the earliest period our law differed from the general canon and civil law in this respect, and has held that the presence of a priest is essential to the validity of a marriage.

Starting from this position, if we can only ascertain the object of requiring the intervention of a person in holy orders in the ceremony of marriage, it will go far to decide the present question. I think it cannot be doubted that anciently, in order that a marriage should be complete and lawful, and accompanied by all the legal consequences of the relation of man and wife, it must have been solemnised *in facie Ecclesiæ*. The cases of *Del Heith* and of *Foxcroft*, both decided in the reign of *Edward I.*, establish this position to its full extent. I do not find that these decisions were ever questioned until the case of *The Queen v. Millis*, when some of the noble and learned Lords expressed their opinion that they had been decided contrary to law. But I agree with my noble and learned friend, Lord *Lyndhurst*, in thinking that there is no sufficient ground for impugning their authority.

That the rule which required a public celebration of the marriage before the church, was afterwards departed from, appears to be clear, though when the change occurred it is not possible to ascertain. The public solemnization of the marriage which was originally required could have been with no other object than that the church should be the witness of the ceremony. And it

is unnecessary to add, that under such circumstances, the marriage would of course be celebrated by a person in holy orders. At the earliest known period, according to the authority of Dr. *Lingard* (Anglo-Saxon Church, vol. 2, pp. 9 & 10), there was no prescribed form of words used at the ceremony of marriage; but the consent of the parties was signified by the giving and receiving the ring at the church door, in the presence of the priest, who blessed it; the nuptial benediction being afterwards pronounced in the church during the celebration of the eucharist. Where the marriage service, which is substantially the same as that which is at present in use, was introduced, part of the ceremony was (as before) performed outside the church, and according to the opinion of the learned Judges, that part which was sufficient "to knit the marriage for civil purposes." Now no reasonable doubt can, I think, be entertained that a person in holy orders, distinct from the intended husband, must always have intervened in this part of the service. This sufficiently appears from that solemn prefatory appeal to the consciences of the parties as to their knowledge of any impediment, and from the mode in which the endowment *ad ostium Ecclesiæ* was made. The priest was apparently a necessary witness to this species of endowment; and from the account which is given of it in *Coke* upon *Littleton*, it seems doubtful whether it would have been good without his presence. This dotation took place "after affiance made and troth plighted," and in the old *York* ritual, there is at this part of the marriage service, the following rubric: "*Sacerdos interroget dotem mulieris, et si terra ei in dotem detur tunc dicatur psalmus iste,*" &c. It would be idle and absurd for the husband to interrogate himself as to the endowment he intended to

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make, although the dotation itself is in terms addressed to his wife.

This consideration of the nature of the ceremony, as consisting of two distinct parts, may serve to explain the mode in which a marriage was regarded as valid, although not solemnized *in facie Ecclesiæ*, and also why the presence of a person in holy orders should be considered as essential to its validity. The use of the formal words of the marriage service was not originally required, the consent to the marriage in the presence of a priest being all that was necessary. The completion of the marriage ceremony took place outside the church, that which afterwards passed within being merely the consecration with religious rites of the previous marriage. The non-observance of the forms of this marriage service did not invalidate the marriage. All that appears to have been essential was the consent to become husband and wife in the presence of the priest. This will account for the opinion expressed by Chief Justice *Pemberton* in *Weld v. Chamberlaine* (*x*), that words of contract *de præsenti*, not following the ritual, repeated by the parties after a person in holy orders who had been ejected, and apparently therefore not in a church, made a valid marriage.

It will be observed that there is not a single case to be found which has decided that the presence of a priest may be dispensed with. This intervention seems to have been regarded as not formal merely, but as substantial and essential. In what character then was it necessary for him to be present? Originally when the marriage was *in facie Ecclesiæ*, the priest must have been regarded as the representative of the Church to receive

(*x*) 2 Show. (by *Leach*, 8vo.) 300.

the consent of the parties, to give the blessing, and to interpose to prevent a marriage where any lawful impediment existed. But, as in the earliest times, the consent was signified by giving the ring at the church door in the presence of the priest, and afterwards, when the marriage ritual was adopted and used, the marriage might be completely solemnized outside the church, and was then sufficient for all purposes, the function of the priest seems to have been solely that of a witness. He had no active office to perform in joining the parties. In the earlier times he passively witnessed the giving and receiving the ring, and when the ritual was introduced, the essential part of the ceremony was that in which the parties gave their troth to each other. The question put by the priest, "Wilt thou have this woman to thy wedded wife?" was not absolutely necessary, and was merely preparatory to the contract itself, which he was called upon to witness. Therefore, a contract *per verba de præsenti* in the presence of a priest not accidentally present, but intentionally, and in order to be a witness, had a very different effect from such a contract where no person in holy orders intervened. In the latter case, although by reason of the contract being indissoluble it was sometimes called, in the ecclesiastical law, *verum matrimonium*, and although it entailed some of the consequences of an actual marriage, and especially prevented the parties marrying any other person, yet it conferred none of the civil rights of marriage, but merely enabled either party by suit in the spiritual court to compel the other to solemnize the marriage *in facie Ecclesiæ*. But where such a contract *per verba de præsenti* was declared in the presence of a person in holy orders present for the purpose of receiving such declaration, there was a

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complete and valid marriage, although, in consequence of not taking place *in facie Ecclesiæ*, it was considered as clandestine, and subjected the parties to the censures of the church. These marriages, however, were regarded by the Ecclesiastical Courts as complete and lawful marriages, and so they were by the courts of common law, and as drawing after them all the legal rights and consequences incident to marriage. Nor were the parties ever compelled to repeat the ceremony in the face of the church. All which is clearly explained by Lord *Lyndhurst* in *The Queen v. Millis*.

This last circumstance will have an important bearing upon the two cases of *Holmes v. Holmes* and *Goole v. Hudson*, which I shall shortly consider. I think it appears very clearly from what has been said, that whatever other reason there might be for requiring the presence of a priest in order to constitute a valid marriage, he was at least necessary as a witness to the espousals. And if his presence was requisite for this purpose, and in this character, then it necessarily follows that he must have been a person distinct from the party to whose contract he was to be a witness. In this view the two cases to which I have just referred have, perhaps, more application than seems to have been supposed. In *Goole v. Hudson* the decree was, that "the parties did enter into and celebrate between themselves a pure and lawful contract by words in the present tense effectual, &c., and that the Respondent ought to be compelled by law to solemnise a true, pure, and lawful marriage in the face of the Church with the Proponent." In *Holmes v. Holmes* the decree pronounced that the parties did on 11th *April* 1811, make a valid matrimonial contract, and take one another *per verba de præsenti* as man and wife, and it ordered that

a lawful marriage should be celebrated in the face of the Church by a priest in holy orders of the Church, and enjoined both parties to enter into and cause the said marriage to be solemnised *in facie Ecclesiæ*. It appeared in each of these cases that the intended husband was a clergyman, and yet in each the decree was that a lawful marriage should be celebrated. Now, as when a clandestine marriage took place in the presence of a priest, the parties were never compelled to repeat the ceremony in the face of the Church, the Court, by decreeing that a marriage should be solemnised *in facie Ecclesiæ*, must have decided that there had been no lawful marriage previously. Now, if the fact of one of the contracting parties being in holy orders was sufficient to give validity to the ceremony, the marriage, although clandestine, would have been held to be good and lawful, and no farther celebration of it could properly have been directed. It is impossible to ascertain from the statement of these cases, whether this point entered into the consideration of them, or was entirely overlooked; but as far as they go, they are certainly favourable to the view which I have taken of the question before the House. It is, however, quite unnecessary to treat them as authorities upon this occasion, because the grounds upon which, from the earliest times, the intervention of a priest has been considered to be necessary in order to constitute a lawful marriage, satisfy my mind that there must always have been some independent and disinterested person distinct from the party contracting, and that his presence could not be satisfied by the accidental possession, by one of the parties, of the qualification necessary for the duty to be performed.

For these reasons, I think that the judgment of the Court below ought to be reversed.

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Sir *FitzRoy Kelly*: Your Lordships' judgment upon the special verdict will be for the Defendant below, the Plaintiff in Error?

The *Lord Chancellor*: Yes.

Judgment reversed.

Lords' Journals, 22 April 1861.

JOHN ARCHBOLD - - - *Appellant.*

WILLIAM SCULLY - - - *Respondent.*

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 March 5, 7.
 April 25.
 ———
*Renewable
 Leases.
 Statute of
 Limitations.
 Acquiescence.
 Landlord and
 Tenant.
 Trust.
 Costs.
 3 & 4 Will. 4,
 c. 27.*

Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed:

HELD, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 42d section of 3 & 4 *Will. 4*, c. 27, the amount to be recovered is limited to six years.

The 24th section of that statute only bars equitable rights, so far as they would have been barred if they had been legal rights.

It is not in the power of a tenant, by any act of his own, to alter the relation in which he stands to his landlord.

A. in 1699 granted to *B.* a lease for lives, renewable for ever. This lease, by the death of *B.* intestate, vested in his four daughters. The interest of three of them became, in 1778, vested in *C.*, who got possession of the whole of the property; but upon *D.*, who claimed one undivided fourth part, filing a bill in Chancery against *C.*, he, in 1779, agreed to accept, and *D.* consented to grant him, a lease of that undivided fourth part for 999 years, at an annual rent of 40*l.* The lives in the original lease dropped in 1784, but all the parties went on for years acting upon its terms. Up to 1828 the rent on the lease of 1779 had been duly paid. *D.* died, having first devised her interest in that lease to *E.* The representative of

C. then asserted a claim to the whole property, and refused to pay the rent of 40 £, and *E.* did not take any steps to enforce its payment. In 1835, the representative of *C.* obtained a renewal of the lease of 1699. In 1854, he became party to a proceeding in the Incumbered Estates Court, and from what occurred there, *E.* became acquainted with facts which induced him, in 1856, to file a bill to have the grantee of the renewal lease declared a trustee for him as to one undivided fourth part of the estate comprised in that lease :

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Held, that *E.* was entitled in equity to this relief, notwithstanding the lapse of time and his own non-enforcement of payment of rent, but he was required to grant a renewal of the lease of the fourth part for the residue of the term of 999 years.

Considering the delay of *E.* in enforcing his rights, the decree was ordered to be made without costs.

PIERSE POWER was seised of the lands of *Carrickavantry* under a lease for lives renewable for ever, made to him and his heirs by the Earl of *Tyrone* in 1699, and of some other lands at *Ballykilmurry*, in the same county, to which he was entitled in fee, and, being so seised, died, leaving five children: one son, *John Power*, and four daughters, *Catherine*, *Margaret*, *Mary*, and *Ellen*. *John* died in 1750, intestate, and without issue, whereupon the four sisters became entitled thereto as tenants in common. Three-fourths of these lands afterwards became vested in the Respondent, *William Scully*. The question now raised related to the remaining fourth.

Catherine, the eldest daughter, married, first, *David Pilkington*, and afterwards *John Dermody*; *Margaret* married *Sylvester Fanning*; *Mary* married *James Carroll*, and died without issue; *Ellen* married *John Donegan*. *James Lonergan*, a grandson of *Margaret*, was in possession of all the premises in 1778, and in that year *Catherine Dermody* (the last life in the original lease of 1699) filed her bill in Chancery, claiming one undivided fourth in her own right, and one-third of *Ellen's* fourth. The suit was

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compromised, *Lonergan* agreeing to accept, and *Catherine Dermody* to grant, a lease of the undivided fourth of all the said lands for 999 years, at 44 *l.* 4 *s.* 4½ *d.*, late *Irish* currency (40 *l.* 16 *s.* 4 *d.* sterling). This lease was duly granted in *August*, 1779, and she received the rent during her life. She died in 1784, leaving four children: *Daniel* and *Ann Pilkington* by her first marriage, and *Pierse* and *Mary Dermody* by her second marriage. *Daniel Pilkington* entered into the receipt of this reserved rent, but died very soon afterwards, leaving his sister *Ann* his heiress at law. She entered into possession, and by deed of 25 *October* 1786, granted one-third part of the lands from her own death to her niece *Catherine Shee*, for the life of *Catherine Shee*, and then to her right heirs for ever; and in case of no such issue or of the issue dying without issue, such third part was to go to *Januarius Fanning* and the heirs of his body for ever; and in case of his having no issue to *James Fanning* and the heirs of his body, remainder to the right heirs of herself, *Ann Pilkington*. This deed was duly registered in *November* 1786. There was a deed with similar provisions in 1789. *James Lonergan* held the estates during his life, and died in 1790, leaving his son, *John Lonergan*, who then entered into possession of them. *Ann Pilkington* died in 1795, and *Catherine Shee*, her devisee, then entered into possession of the rents of the undivided fourth part. *John Lonergan* had three daughters, *Mary Anne*, *Bridget*, and *Margaret*; and by his will in *February*, 1797, after bequeathing an annuity to his wife, he gave all his interest in the estates in question to these three daughters. *Bridget* died unmarried; *Margaret* married *F. M. Power*, and died without issue; *Mary Ann* married Dr. *William Scully*, who died in 1824, and leaving *W. Scully*, the Respondent (then an infant, of twelve years of age), his

deest son and heir-at-law. The rent under this lease was regularly paid to *Catherine Shee* up to the time of her death in 1828.

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Catherine Shee had, in *March* 1828, made her will, and thereby devised unto the Appellant, *John Archibald*, all her title and interest under the lease of *August* 1779, and empowered him to demand the rent thereby secured to meet the charges created by her will, and also constituted him her residuary legatee. Upon the death of *Catherine Shee* in 1828, *Mary Anne Scully*, the mother of the Respondent, claimed to hold the estates in her own right discharged from all incumbrances, and she refused to pay any rent to the Appellant, asserted that *Catherine Shee* was only an annuitant for life, and never admitted my suggestion as to the existence of the lease of 1779. She died in 1830, and her son, the Respondent, was then made ward in Chancery, and a receiver was appointed over the estates. In *April* 1835 the Marquis of *Waterford*, the owner of the reversion in fee of *Carrickavantry*, granted three new lives, to *James Scully* and *Thomas Butler*, as trustees under a settlement of 1821, a renewal of the original lease of 1699. In *November* 1854, the Appellant heard that a petition had been lodged in the Court for the sale of Incumbered Estates, praying for the sale of the lands of *Carrickavantry* and *Ballykilmurry*; and being applied to for the production of any deeds he might possess with relation to these estates, he directed an inquiry into the matter. The result was, that on 4th *January* 1855, he entered a claim in the Court for the rent due under the lease of 1779, relying on the secondary evidence of the lease given in that suit, for the lease itself had never been in his possession. Various proceedings took place, and on the 25th *April* 1856, after argument by counsel, the Commissioner made an order confining the sale of the lands to three undivided fourths,

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“the owner’s title to the fee simple of the other fourth not having been fully deduced.” The petitioner for the sale was to be allowed to amend his petition, or to take such other step as he might be advised. In the proceedings which subsequently took place, the lease of *August 1779* was produced. The final order of the Commissioner, dated 11 *February 1858*, directed a sale of all the lands, including the residue of the term of 999 years under this lease, for the purpose of discharging the incumbrances thereon.

Before this final order was made in the Incumbered Estates Court, the Appellant filed his cause petition in the Court of Chancery, setting forth the facts above stated, and praying for a declaration of his right to the reversion expectant upon, and the rent reserved by, the lease of *August 1779* (the knowledge of which he alleged to have been fraudulently kept from him) of one undivided fourth part of the estates, and that *Thomas Butler*, the surviving trustee under the settlement of 1821, should be declared trustee for the Appellant under the renewal of *April 1835*, as to one undivided fourth part of *Carrickavantry*, and be decreed to convey accordingly; that *W. Scully* should pay the Appellant the arrears of the rent of 44 *l.* 4 *s.* 4½ *d.*; and should bring into Court the original lease of *Carrickavantry* and the renewal thereof, and the lease of *August 1779*, and for general relief.

The Respondent *Scully* appeared, and put in an answer to this petition, setting forth that, in *October 1786*, *Ann Pilkington* conveyed the lands to *Catherine Shee* in tail, with remainders to *Januarius* and *James Fanning*, all of which estates having failed, the Respondent was entitled as the sole survivor and heir-at-law of the four co-heiresses; that *Catherine Shee* not having barred the entail, was only entitled to the rent for her life, and had no right to make the will of 1828; and that the deed of *April 1789*

was void by reason of the prior deed of *October* 1786, and he relied on the possession since the death of *Catherine Shee*, and on the statute of limitations.

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The cause came on to be heard before Lord Chancellor *Napier*, who, on the 7th *May* 1858, ordered that the Appellant's petition should be dismissed, upon the ground that his claim to equitable relief was barred by lapse of time (*a*). This decision was confirmed by the full Court of Appeal (*b*). The present appeal was then brought.

Mr. *Butt* (of the *Irish Bar*), and Mr. *Roundell Palmer*, for the Appellant:

The first question here is, whether the landlord, under the lease of 1779, is barred by the statute of limitations from remedy against his tenant under that lease? Secondly, is he barred by any laches from asking for any equitable relief? *Scully* here is only tenant under a lease for years. His possession is therefore that of his landlord. A tenant cannot by his own act get rid of his character of tenant, and assume a different character, *Saunders v. Annesley* (*c*). It is true that adverse possession for twenty years would defeat the landlord's title, but adverse possession as between landlord and tenant is not constituted by mere non-payment of rent. *Doe d. Graves v. Wells* (*d*). There must for such a purpose be some positive act, such as the payment of rent to a person claiming adversely, and on a different title, *Chadwick v. Broadwood* (*e*). Equity does not allow mere lapse of time to bar the recovery of a rentcharge, *Cupit v. Jackson* (*f*); *Stackhouse v. Barnston* (*g*); *Collins v. Goodall* (*h*).

(*a*) 8 Ir. Ch. Rep. (N. S.) 177.

(*e*) 3 Beav. 308.

(*b*) Cas. Temp. *Napier*, by Drury, 330.

(*f*) 13 Price, 721.

(*c*) 2 Sch. & Lef. 73.

(*g*) 10 Ves. 453.

(*d*) 10 Ad. & El. 427.

(*h*) 2 Vern. 235.

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It is true that equity does not favour stale demands, but acts upon analogy to the statute of limitations, *Cholmondely v. Clinton* (i), adopting what was said by Lord Redesdale in *Bond v. Hopkins* (j); but that is the only case of the kind, and there no such relation as that of landlord and tenant existed between the parties. *Doe d. Davy v. Oxenham* (k), and *Grant v. Ellis* (l), show that in such a case the provisions of the statute of limitations do not apply, except so far as relates to the amount of rent to be recovered. A tenant not only cannot set up a title in opposition to that of his landlord, but is bound to perform that which is necessary to maintain his landlord's title, *The Attorney-General v. Fullerton* (m), where the tenant having permitted boundaries to be destroyed, so that the landlord's land could not be distinguished from his own, was ordered to restore it specifically, or to substitute land of equal value.

There has been no acquiescence here so as to deprive the Plaintiff of his title to equitable relief, *Blennerhasset v. Day* (n); *Crofton v. Ormsby* (o). The right to renewal is kept alive in *Ireland* by the Tenantry Acts, *Galbraith v. Cooper* (p). Here the Defendant held as tenant under the lease of 1779 up to the year 1835, and his character on the day after the renewal was the same as on the day before it. He did not change it, nor get rid of his duties, by the mere fact of obtaining the renewal; and, as Lord Redesdale distinctly declared in *Saunders v. Annerley* (q), "when a tenant does anything to embarrass the tenure, the landlord has a right to the assistance of a

(i) 2 Jac. & Wal. 139, 190;
 Turn. & Russ. 107.

(j) 1 Sch. & Lef. 413, 429.

(k) 7 Mee. & Wels. 131.

(l) 9 Mee. & Wels. 113.

(m) 2 Ves. & Bea. 263.

(n) 2 Ball. & Beat. 104.

(o) 2 Sch. & Lef. 583, 603.

(p) 8 H. L. Cas. 315.

(q) 2 Sch. & Lef. 73, 108.

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court of equity." In truth the persons taking the renewal took it as trustees for their immediate landlord, whose rights they were bound to preserve. The distinction between laches and acquiescence was well taken in *The Rochdale Canal Company v. King* (r), and the same distinction was acted on in *Leeds v. Amherst* (s), and the mere lapse of time was not allowed to prevent the grant of equitable relief where the title to it was otherwise clear.

Sir *H. Cairns* and Mr. *Longfield* (of the *Irish* bar) for the Respondent:

The Appellant here was acquainted with all the facts, and his delay and acquiescence are fatal to him. Suppose the legal bar to recovery at law to be out of the way, how would the right of the Appellant stand at law? For if he has no right at law, there is no pretence for him to ask for the assistance of a court of equity. The right to demand a renewal was gone, by delay, before 1835. So long as the lease remained, there was, at law, a freehold interest; but, when that ended, the tenant would be at liberty to show that the title of his landlord had come to an end. The payment of rent, after that, to the head landlord, created, as between him and the person paying it, the relation of landlord and tenant; and the latter became tenant from year to year, under a parol agreement, the terms of which would be evidenced by the covenants of the old lease, so far as they were applicable. That would continue so long as *Catherine Shee* lived, but as soon as she died, the tenancy from year to year came to an end; and, in fact, an adverse claim was set up, and not one shilling of rent has since been paid, while

(r) 2 Sim. (N. S.) 87 *et seq.* (s) 2 Phill. 117.

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a new lease of the property has been obtained. That state of things, which is one of actual ouster, has existed for more than twenty years, during all which time the supposed tenant has been holding over without payment of rent, and the right of his supposed landlord is, under the statute, gone. That is clearly the position of this Appellant at law, and it is one of adverse possession. *Foot v. Warren* (1) is directly in point. In that case there was, in 1761, a lease for lives, renewable for ever, granted by *D.* to *N.* In 1769, *N.* underlet to *W.*, who, in 1782, demised to *A.*, at a profit rent. In 1794 the original lease was renewed for two lives, and, while they were in existence, *D.*'s heir became the assignee of *N.*'s interest. The two new lives expired in 1837, but the representatives of *A.* went on paying to *D.*'s heir, as possessor of *N.*'s interest, the rent reserved by the lease of 1769, and, to the possessor of *W.*'s interest, the profit rent under the lease of 1782, but paid no rent after that period. In 1851 *D.*'s heir brought ejectment for non-payment of the rent, under the lease of 1769; the representatives of *W.* were not served with notice of this ejectment, and, in 1858, they brought ejectment against *A.* for non-payment of the profit rent under the lease of 1782. By the *Irish* statutes ejectment for non-payment of rent cannot be maintained, unless the tenant is a person holding under a contract, in writing, and therefore the Courts of Queen's Bench and Exchequer Chamber held that this latter ejectment was not maintainable, the tenancy, if any, being nothing more than a parol yearly tenancy created by holding over and paying rent after 1837. Here, it cannot be said that there was a lease in writing constituting a continuing tenancy, for that is exactly what

(1) 10 Ir. Com. Law Rep. (N. S.) 1.

Foot v. Warren shows not to be the case. The difference between holding over under a lease, and holding over after a lease, is shown in *Doe d. Rigge v. Bell* (u), and *Doe d. Lansdell v. Gower* (v).

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There is no pretence here for claiming that those who took the renewal in 1835 shall be treated as trustees for the Appellant. They were not his trustees expressly appointed, and the 25th section of the 3 & 4 Will. 4, c. 27, only applies to cases of express trust. Here the persons taking the renewal were only trustees for those really entitled, namely, the Respondent, and they cannot be made responsible upon an implied trust: *Petre v. Petre* (w).

There was here no tenancy of the sort supposed, for it is a rule of law in *Ireland*, that all leases derived from a lease for lives renewable for ever fall with the original lease. The relationship of landlord and tenant, on which so much reliance is placed, came, therefore, to an end when the lives in the first lease ceased, and that was so settled a doctrine, that a statute, 5 Geo. 2, c. 4, s. 4 (*Ir.*), was passed to prevent some of the evils to innocent sub-lessees that occasionally arose from the application of the rule. The 12th section of the Limitation Act shows that the possession of the Respondent could not enure to the benefit of the Appellant, so as to prevent the statute running against the Appellant. In *Burroughs v. McCreight* (x) it was held, that a possession by the enjoyment of the profits of land, though not adverse, in the old sense of the law, is in itself a bar and transfer of the

(u) 5 Term. Rep. 471; 2 Smith's Leading Cases, 94 n. on the 25th section in his judgment in *Burrows v. Gore*, 6 H. L. Cas. 907-961.
(v) 17 Q. B. Rep. 589.
(w) 1 Drewr. 371. See the observations of Lord St. Leonards (x) 1 Jo. & Lat. 290.

25th section.

[Lord *Cranworth* : The 25th section does not
this case, for that is between beneficiaries and their

The *Lord Chancellor* : Suppose the Plaintiff
titled under the lease, what is the exact time at which
would be barred by the statute?]

The Respondent contends it would be from the date
of *Catherine Shee* in 1828, or taking the most favourable
view for the Respondent it would be 1835, when the lease
was granted.

Mr. *Butt* replied.

The Lord Chancellor (Lord *Campbell*):

April 25.

My Lords, it seems to me that the Appellant is
entitled to the aid of a court of equity in respect of his
interest in the reversion of one-fourth of the lands of
Carrickavantry, demised by the lease of 1779.

By the will of *Catherine Shee* he would have been
entitled at her death, in 1828, to the rent of 4000
the lease of *Carrickavantry* had been duly renewed by the
Marquis of *Waterford* on the death of the last co-tenant
in vie, under the lease of 1699, and if the *Scully* family
signees of the lease of 1779, had been in possession of
the lands thereby demised for 999 years. The lease of 1699
had not been renewed: but all the parties have been

44 l. 4 s. 4½ d. I conceive that although, at law, tenancies from year to year had been created after the death of *Catherine Dermody*, between the Marquis of *Waterford* and the party from whom he received rent in respect of *Carrickavantry*, and between Mrs. *Scully* and *Catherine Shee*, yet all the parties, who were acting as if there had been a renewal of the lease of 1699, would, in equity, be considered as having the same rights as if there had been such a renewal.

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In 1828, on the death of *Catherine Shee*, and the refusal of the *Scullys* to pay rent to the Appellant, I cannot doubt that a court of equity would have interfered in his favour; and, by decreeing a renewal of the lease of 1699, would have enabled the Appellant to recover the rent under the lease of 1779.

Would he not have been entitled to the same relief if he had applied to a court of equity at any time before the lease was renewed in 1835? The lapse of seven years could have been no bar.

The real question in the case seems to me to be, whether the Appellant is barred by the lapse of time between 1835 and 1857, when his bill (or cause petition) was filed.

If any new rights had been created in this interval, or if any one would be prejudiced by the delay, that is, by the Appellant being now enabled to make good his claim, I should be clearly of opinion that he is barred by *laches* or *acquiescence*, or whatever name may be given to his long sleep over his rights. But I do not discover any obstacle of this sort to the relief which he prays, and without imputing any fraud to the *Scullys*, it seems to me to be against conscience that they should seek to avail themselves of the renewal of the lease in 1835 for their own exclusive benefit. If the lease of 1699 had

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been duly renewed, the lease of 1779 would in all respects be in full vigour. This lease seems to have been treated as a subsisting lease in the Incumbered Estates Court, and the Appellant may still have the benefit of it.

The Judges who have pronounced the decrees appealed against have not had sufficient regard for equitable rights after the death of the last *cestui que vie*. To the Plaintiff's equitable title, I think that the Statute of Limitations is no bar, and *laches* is no sufficient answer.

I must, therefore, advise your Lordships that the decrees appealed against be reversed.

Lord Cranworth:

My Lords, when *Catherine Dermody* granted the lease for 999 years in 1779, she was herself the last surviving *cestui que vie* named in the lease made by the Earl of *Tyrone* in 1699; and looking first to the legal rights of the parties, it is clear that her lease must be deemed to have taken effect out of her legal interest. She and *James Lonergan* were then tenants in common for the term of her life under Lord *Waterford*, as representing the Earl of *Tyrone*, i. e., she as to one-fourth, and *Lonergan* as to three-fourths.

By the death of *Catherine Dermody* in 1784, the original lives of 1699 came to an end, and there was no longer the legal relation of landlord and tenant between those who succeeded to her and *Lonergan*, to whom she had demised for 999 years. But though the original lease expired by her death, she had by statute an equitable right to have the lease renewed; and *Lonergan*, and those who succeeded to him, continued to pay to her real representatives the rent reserved by the lease of 1779, as if the term

of 999 years was still in existence. This was done up to the year 1828, when the Appellant's title accrued; since that time no rent has been paid. The legal effect of the payment by *Lonergan's* representatives of the rent reserved in 1779, was to make them tenants from year to year to those deriving title under *Catherine Dermody*; and all claim by virtue of that legal right is clearly gone by the joint operation of the 2d and 8th sections of the Statute of Limitations. As to the legal right there cannot, I apprehend, be a doubt.

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Attached to her legal tenancy under Lord *Waterford* of one-fourth of the lands in question, *Catherine Dermody* had, as I have already said, an equitable right to have, when that tenancy should expire, a renewed lease for lives granted to those deriving title under her, and so on, for ever; and the lease of 1779 certainly created a good equitable charge on that equitable reversionary interest. Whenever a renewed lease should be granted to her representatives as to one fourth, and to *Lonergan* or his real representatives as to three-fourths, the lease of 1779 would give to *Lonergan*, and his personal representatives, a title in equity to *Catherine Dermody's* one-fourth, paying the rent reserved, and would, on the other hand, give to *Catherine Dermody's* real representatives a right to the reserved rent. It was doubtless on the ground of this equitable right that the rent was regularly paid from 1784, when the legal title came to an end, up to 1828, when the title of the Appellant accrued.

If at that time the Appellant had taken the proper measures, he might have obtained a renewed lease to himself and the Respondent's mother, who was then living, as tenants in common, which would, in equity, as to his fourth part, have been subject to the lease of 1779.

tenant would not have been affected. Suppose immediately after the death of *Catherine Dermody* her devisee, *Daniel Pilkington*, and *John Lonergan* lessee, had concurred in obtaining a new lease from *Waterford* for three new lives, and that a new lease residue of the 999 years term had been granted by *Pilkington* to *Lonergan*, which I need not say he would have been bound to grant, and suppose, farther, that one of the new lives had endured, as it well might, in 1857, those claiming under *Lonergan* would, in such case, be the legal tenants of the Appellant; the legal right to the reversion would have been in him, and his right to the land in respect of that reversion, would not have been affected because he had suffered it to fall into arrear for so long a time. It can make no difference in the construction of a court of equity that no renewal was obtained. The ground landlord continued to receive his head rent from those who, from time to time, presented the original lessee, *Peirse Power*, and the relation of ground landlord and tenant continued to exist between them. It is true that at law those who held the land were only tenants from year to year under the ground landlord, but they had a right in equity which was, for the purpose of our present inquiry, equivalent to a fee simple, *i. e.* a right to have grants for lives from the owner of the fee. If before 1784 a grant

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in 1784 a renewed lease for lives had been obtained from Lord *Waterford*, and a new lease for 999 years had been granted to *Loneragan* or his representatives, they would have been the legal tenants for years of the Appellant, or of those under whom he derives title. I cannot doubt but that the equitable rights of these same parties constituted between them the equitable relation of landlord and tenant for the term of 999 years. It is now clearly established that so long as such relation subsists as a legal relation, the landlord's right to rent is not barred by non-payment for however long a time. The right to the rent is an incident to the reversion. The Statute of Limitations does not apply, except, indeed, that by the 42d section it prevents the recovery of arrears for more than six years; and the same principle must govern the case of a demand in equity. The 24th section of 3 & 4 *Will. 4*, c. 27, only bars equitable rights so far as they would have been barred if they had been legal rights. I am therefore of opinion that if no renewal had been made since 1784, the right of the Appellant, except as to arrears, would have been unaffected by the Statute of Limitations.

The question then is, whether the equitable right of the Appellant was altered by the renewal obtained by the Respondent, or by those who acted for him in 1835. On this point I have had some fluctuation of opinion; I had a doubt whether it did not amount to an actual ouster of the Appellant, as was contended at the bar; but I have arrived at the conclusion that the Appellant's rights remain unaffected. If I am right in saying that up to the time when this renewal was effected, the Appellant and the Respondent stood to each other in the view of a court of equity, in the relation of landlord and tenant,

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it could not be in the power of the Respondent by any act of his to alter that relation: He must be considered, in obtaining the renewal, to have intended to act in a manner consistent with his legal and equitable duties. He ought to have taken the renewal in the names of the Appellant and of himself as tenants in common, and not, as he did, in those of himself and certain other persons having interests under him, or under those who had gone before him, but who were strangers to the Appellant. He failed in his duty, probably, from mere ignorance on the part of those who acted for him. But he could not by violating his duty as trustee, and neglecting the interests which he was to protect, prejudice the rights of the person who stood to him in the relation of *cestui que trust*. On these grounds I have satisfied myself that the rights of the Appellant are unaffected by the Statute of Limitations.

With respect to the argument that, independently of the statute, the Appellant is barred by laches, I cannot think that it rests on any solid foundation. Indeed it was not much relied on in the argument at the bar. Courts of equity do not, it is true, encourage stale demands, but the right now insisted on is one which is, in substance, renewed as often as fresh rent is payable. The legal principle is, that the rent is incident to the reversion, and on every day on which rent becomes due, under the deed constituting the tenancy, whether it be made payable yearly, half-yearly, or oftener, a right of distress accrues. In such a case laches appears to me to be out of the question. Neglect to enforce payment of the rent deprives the lessor, by the express terms of the statute, of all arrears beyond six years; but as to all accruing payments, the legal principle is, that the right is constantly renewed. In such a case I see no room for

introducing the doctrine of laches. Bygone arrears are lost, but there can be no neglect in not enforcing what is not due.

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Considering the very high authority by which the cause was decided in *Ireland*, it is not without hesitation that I have arrived at a conclusion different from that at which the eminent judges, whose decision is now under review, had arrived; but, having given to the case my best attention, I feel bound to say I think they were wrong.

I think the Appellant is entitled to a decree, declaring him entitled to have a conveyance of one undivided fourth part of the lands comprised in the renewed lease for the lives named therein, subject, nevertheless, to a lease to be granted by him of that fourth to the Respondent, or to those entitled under him, for the residue of the term of 999 years, created in 1779, at the yearly rent of 40*l.* 16*s.* 4*d.* An account must be taken of what is due to the Appellant for arrears of the rent for six years previous to the filing of the cause petition, against which must be set off one fourth part of the fines and costs of renewal; and it must be declared that the Appellant has a valid charge on the one-fourth demised, for whatever shall be found due to him on taking the account. This is the decree which ought, I think, to have been pronounced by the Court below; but, considering for how long a time the Appellant remained passive without enforcing his right, I think the decree ought to have been made without costs.

Lord Wensleydale:

My Lords, from the very high respect which I feel the eminent authorities by which this case was decided, the late *Lord Chancellor of Ireland* in the first in-

have given, and which I believe my noble and
friend who will follow me will also offer to yo
ships.

The question here relates solely to the lands a
avantry, held under the renewable lease for li
defendant contends, first, that the Petitioner
barred by the Statute of Limitations, 3 & 4 *Wil*
secondly, if not, that he was deprived of his
remedy by laches or acquiescence. The late *L*
cellor of Ireland, and the Lord Justice *Black*
Mr. Justice *Crampton*, all concurred in opi
either on one ground or the other, the Appella
entitled to relief. I have fully considered th
given by those very learned judges, and I ca
they have come to a right conclusion.

Before considering the main objection found
Statute of Limitations, it may be as well to
one point raised in the cause petition of the
It is stated that there was a fraudulent suppo
concealment by *Mary Ann Scully* of the lease
and a false assertion that *Catherine Shee* wa
annuitant or tenant for her own life, and that
lant discovered the fraud only in the year 1854
not, with reasonable diligence, have discovered

that the Appellant has not made out any such case of concealed fraud, and if he had, he had more than 20 years before the suit the power of discovering it by reasonable diligence, and this part of the statute therefore does not apply, nor do I think any other section

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On the 24th, no person claiming land or rent in equity bringing any suit to recover the same, but within the year during which he could have made an entry or distress brought an action to recover it, if he had been entitled at law. The question then is, whether if he had been entitled at law to the rent reserved on the lease of the divided fourth part, he would have been barred by the statute. At law, the head lease of the 22d *February* 1779 for three lives, determined by the death of *Cadogan Dermody*, the last survivor of these lives, in the year 1784. When the head landlord after that received the rent from the lessor, he created a tenancy for years from year to year. So the sub-lease of the 14th *August* 1779 determined also, and a new holding from year to year was created in the lands leased by it, between the lessor and their assigns, and the tenants or theirs. At law, the lessor or the former to recover the land, so held under a tenancy from year to year, would have been bound by the lapse of years from the last receipt of rent, under the 8th section of the Act. But that is not the equitable relation between the parties to the lease of 1779 and their assigns. The parties treated the head lease for lives renewable as a *quasi* freehold, and the sub-lease for 999 years as a lease of that *quasi* freehold for that term. The law therefore must be considered as the equitable relation between the Appellant and the Respondent. The Appellant is in equity the assignee of the original renewable lease for lives; the latter the assignee of a lease for 999

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years of an undivided interest of one-fourth. Has anything happened to bar the Appellant's equitable right? I will consider, first, whether it would be barred by the Statute of Limitations, as to the freehold lands comprised in the same lease, those of *Ballikilmurry*, by what has been done by the parties with respect to those lands; for if it has not as to the legal interest, so it cannot so far as relates to the statutory limitation, be barred as to the equitable interest in the lands of *Carrickavantry*. I think that nothing has happened to bar the Appellant's right at law, as landlord of the undivided fourth of the freehold lands of *Ballikilmurry* under the Statute of Limitations.

The possession of the tenant during the term is the landlord's possession. That is laid down by Lord *Redesdale* in *Saunders v. Annesley* (y). The tenant cannot be allowed to deal with the possession so as to deprive the landlord of his right. "This distinction" (says Lord *Redesdale*), "must be exactly observed, or property will be thrown into confusion, especially in cases of long terms or elegits, where no rent is reserved to keep up the memory of the tenure." Therefore, he says, "I take it to be that whenever a person comes to the possession either by judgment of law or his own agreement, and holds that possession, he and all who claim under him must hold it according to his right to the possession, and cannot qualify it by any other right."

The Respondent in this case had really no right except to the leasehold interest in the term of 999 years, for which the undivided fourth part of the lands was demised, when he took possession, and he must continue to hold it for his landlord. His neglect or refusal to pay rent is nothing. If his setting up his own title should amount

(y) 2 Sch. & Lef. 98.

to a disclaimer of holding under the Appellant, it would signify nothing, for in the first place, a disclaimer has been held not to be a forfeiture of a term for years, *Doe d. Graves v. Wells* (z); and, if it were, the landlord would not be bound to take notice of it, but might wait till the end of the term. This right is preserved by the 4th section of the 3 & 4 W. 4, c. 27. In truth, the only period of limitation, where lands are held under a lease in writing, is 20 years from the payment of rent *to a third person*. Attornment alone to a third person, it seems, would not do. Where is the third person here? The tenant, by withholding the payment of rent, and keeping it himself, cannot place himself in the situation of a third person. He merely keeps it in his own pocket; and whether he does this wilfully without excuse, or under a claim of title, it is merely the non-payment of rent, so far as the Statute of Limitations is concerned, and no more; and therefore it is no bar.

But it seems that the Lord Chancellor *Napier* and Lord Justice *Blackburne* relied upon there having been an ouster of the Appellant as tenant in common of the one-fourth share by the Respondent, the co-tenant in common of the other three-fourth shares, by the sole receipt of the rents and profits. It appears to me that this view of the case is mistaken. The undivided fourth demised by the lease of 1779, was held by the Respondent for the Appellant. The possession of the tenant is the possession of the landlord, and so the Appellant is not ousted by the mere non-payment of rent to him. If there had been no lease, and the same circumstances had occurred where the Appellant had his one-fourth in his own possession, and the Respondent had the other three-fourths in his,

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(z) 2 Per. & Dav. 390; 10 Ad. & El. 427, 436.

the difference, and the Appellants title under no way affected merely by the taking by the common, of all the profits; so far, therefore, of Limitations is no bar to the Appellants in the lands of *Ballykilmurry* to the one-fourth the lease of 1779, and therefore he is not bound by the twenty-fourth section, as to his equitable title in a similar term in the lands at *Carrickavantry*.

We have then to consider whether the reversionary head lease of those lands, to the trustees of the marriage settlement, in 1835, makes any difference to the Appellant's right to the rents due under the lease. If one of the lives still remained, and that lease still continued a legal interest, and the Respondent surrendered the head lease, it would not have been the sub-lease at all (see 4 Geo. 4, c. 28, s. 6, and 5 Geo. 2, c. 4, s. 4, *Irish*); and if the Act of 1835 could be considered as more than a mere proviso, whether it would be a forfeiture or not is not material; for if it was, as I have before stated, the leaseholder would be bound to insist upon it. And if this would not be the case at law, if the interests of the several parties were the same, the result would be the same where the title is equitable; and the Appellant's equity, so far as it respects the rent, to be restored to the possession of the rent, would not be barred by the Statute of Limitations. I think

benefit of the renewed head lease, and that the lessees herein shall be declared to be trustees for him as to his fourth. It is clear from the recital in the new lease from Lord *Waterford*, that the renewal was made in pursuance of the covenant of the Earl of *Tyrone*, in the original lease; and from the allegation that the new lessees were the true assigns of the original lessee. I conceive that the principle of *James v. Dean* (a), applies to this case, and that the new lessees cannot be permitted to say that the lease so obtained is not held for the benefit of the parties really entitled, whether the new lease was *bonâ fide* procured under a belief of their real title or not.

As to the contention that the Appellant is barred by laches and acquiescence, which was brought forward in the argument, but not very strongly pressed, I agree entirely with my noble and learned friends. So far as laches is a defence, I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact, of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be any equitable bar. In this case, I cannot say that anything has been done or permitted which falls under the definition of acquiescence.

I; therefore, entirely concur in the advice of my noble

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(a) 11 Ves. 383, 392; 15 Ves. 236.

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and learned friends, and I apprehend the form of decree ought to be that recommended by my noble learned friend who last spoke.

Lord *Chelmsford* :

My Lords, two questions have been raised in the case :—

1st. Whether the Statute of Limitations (3 & 4 *Will.* c. 27) barred the Appellant's suit?

2dly. Whether by laches, or acquiescence, the Appellant has precluded himself from equitable relief?

An endeavour was made in the argument for the Appellant to bring his case within the protection of the 26th section of the 3 & 4 *Will.* 4, c. 27, on the ground of a fraudulent concealment by the *Scullys* of certain facts connected with his title. But the Appellant can derive no assistance from this section. Even supposing that the *Scullys* withheld information which they were bound to communicate, this would not be a "concealed fraud," within the meaning of the Act. But they certainly were under no obligation to disclose to the Appellant the particulars of his title; and if they were, and their silence or refusal could be converted into such a fraud as was intended by the Act, there is ample proof that, with reasonable diligence, the Appellant might have discovered his rights and the liabilities of the Respondent. And this circumstance alone would be sufficient to exclude the operation of the 26th section. The case, therefore, is open to the objections arising from the Statute of Limitations, and the effect of the laches, or acquiescence, of the Appellant.

There is no difficulty in determining how the question would have stood at law, and, indeed, how it stands with respect to the lands of *Ballykilmurry*. It is quite

clear as to these lands, that the Appellant is not barred of his remedy by the 9th section of the Act. For, although the Respondent has paid no rent to the Appellant upon the lease of the 14th *August*, 1779, yet he has not paid to any other person; and the mere retention of the rent, or rather the nonpayment of it by him, is not equivalent to the receipt of the rent by some person wrongfully claiming to be entitled to the rent in reversion immediately expectant on the determination of the lease.

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The only doubtful question really is, What is the equitable relation of the parties in respect to that portion of the lease of 1779, which relates to the lands of *Carrickavantry*? In order to determine this point, let us suppose that while *Mary Anne Scully* was paying to *Catherine Shee*, the rent reserved by the lease of the 14th *August* 1779, she had obtained a renewal of the head lease of 1699. Although this lease of 1699 had ceased to exist, and had been converted into a tenancy from year to year, yet that the renewal of this lease would have enured to the benefit of *Catherine Shee* is clearly established by the authority of Lord *Eldon* in the case of *James v. Dean* (b). Now the renewal of a lease has the effect of reviving all the charges and incumbrances which attached upon the original lease; and, therefore, I apprehend that upon such a renewal by *Mary Anne Scully* she would have had a right in equity to demand a new lease of the one-fourth of the lands of *Carrickavantry*, and *Catherine Shee* would have had a corresponding right to compel her to accept a lease for the residue of the term of years created by the lease of 1779.

If these would have been the respective rights of the parties had the renewal taken place while *Mary Anne*

(b) 11 Ves. 383, 392; and 15 Ves. 236.

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Scully was paying the rent to *Catherine Shee*, did anything occur to vary these rights before the actual renewal was obtained? No change of circumstances can be suggested to have taken place, except the cessation of payment of the rent for the seven years from 1828 to 1835. The relation between the parties prior to 1828 had been that of a tenancy from year to year, and therefore if the non-payment of the rent had continued for a sufficient length of time before the renewal of the lease of 1699, the 8th section of the statute would have deprived the Appellant of the benefit of the renewal, and would have barred his remedy. But the non-payment of rent by the tenant from year to year, for seven years only, did not change the condition of the parties, and the renewal in the year 1835 had precisely the same effect upon their rights as it would have had if it had occurred during the time when *Catherine Shee* was receiving the rent. The Respondent, therefore, obtained the renewal of the lease of 1699 for his own benefit, and for that of the Appellant, the part owner with him of the lands. Upon such renewal, all the rights and liabilities which existed in the original lease revived, and attached upon the renewed lease, and the relation which originally subsisted under the lease of 1779, and which continued to be recognised from the year 1784 down to the year 1828, was restored, and in equity the parties became lessor and lessee again for the remaining years of the term originally created.

The Respondent, therefore, must be considered in equity as having been, after the year 1835, a lessee under a lease in writing, upon which the non-payment of rent for 20 years would not constitute a bar; for by the 24th section of the statute, a person claiming land in equity may bring his suit within the period during which he might have brought an action if he had been entitled at law,

and it has been already shown that under the 9th section, which is applicable to the case of a lease in writing, the mere non-payment of rent will not bar the remedy.

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The Statute of Limitations, then, not operating as a bar to the Appellant's suit, the only remaining inquiry is, whether he has by his conduct disentitled himself to relief in equity. If the Appellant were invoking the aid of a court of equity to remove some legal impediment to his recovery at law, the Court would have to decide whether (according to the words of Lord *Redesdale* in *Hovenden v. Annesley* (c)) "it would be good conscience to interfere in his favour, to take from the Respondent that which would be a defence at law." But it is a mistake to suppose that the intervention of a court of equity is required in this case merely in consequence of the renewal of the lease of 1699. The application to a court of equity is necessary, because, as to the lands of *Carrickavantry*, the Appellant's title is purely equitable. Suppose the renewal lease of 1835 were out of the way, and the Appellant were to proceed at law, he would have no case except that which depended upon the payment of rent to *Catherine Shee* after the lease of 1779 had terminated. But as the continuance of possession and payment of rent by the tenant after this event created a tenancy from year to year, the Statute of Limitations began to run from the time when the non-payment of the rent commenced, and his remedy at law would clearly have been barred, under the 8th section, in the year 1857, when he first instituted proceedings.

It is only in a court of equity, therefore, that the Appellant can successfully assert his claim. Now, although in dealing with his case in equity, the Statute of Limita-

(c) 2 Sch. & Lef. 607.

cannot be regarded as anything more than laches. As Lord Cranworth said, in *The Rochdale Canal Co. v. King* (c), " Mere acquiescence (if by acquiescence be understood only the abstaining from legal proceedings) is unimportant. Where one party invades the rights of another, that other does not in general deprive himself of the right of seeking redress merely because he is passive, unless, indeed, he continues inactive for a long time to bring the case within the purview of the Statute of Limitations." If the Appellant had asserted his rights for the long period which he took no steps to prosecute his claim, intervening time the other parties had altered their position, his case would have been very different. He then have placed himself in a position in which it would have been unconscientious for him to enforce his rights, and in such circumstances the Court, under the head of equity, might properly have refused its aid on his behalf. In this case, however, there has been no substantial alteration in the condition of the Estate, and there is nothing in the conduct of the Appellant beyond his having suffered so many years to constitute a bar to the right accrued before its assertion. The Appellant's delay, in my opinion, is not sufficient to disentitle him to the relief which the Court of Equity is bound to give in the relief which

distinguished Judges who have refused him this relief, I cannot bring my mind to the conclusion at which they have arrived, and I am compelled to submit to your Lordships that their decree ought to be reversed. I think that the decree ought to be in the terms which have been expressed by my noble and learned friend.

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Some discussion ensued as to the mode in which the accounts were to be taken, and as to the allowances to be made in taking them. The following Order was made:

"That the decretal orders of the 7th of *May* 1858, and of the 2d of *November* 1858, be reversed: and it is declared, that the Appellant is entitled to one undivided fourth part of the lands of *Carrickavantry*, comprised in the new lease of the 10th of *April* 1835 (which is the subject matter of this appeal) for the term and interest thereby granted, with the benefit of the covenant of renewal, and to have a conveyance of the same, subject nevertheless to a lease to be granted by him of the said fourth part, together with the one undivided fourth part of the said Appellant in the lands of *Ballykilmurry*, both of which said undivided fourth parts were demised by *Catherine Dermody* to *James Lonergan*, by the lease of the 14th of *August* 1779, in the proceedings mentioned, to the said Respondents *William Scully* and *Thomas Butler*, or to those entitled under them, for the residue of the term of 999 years created by the said lease of the 14th of *August* 1779, at a yearly rent of 40*l* 16*s.* 4*d.* *English* currency: and it is farther ordered, that an account be taken of what is due to the Appellant for such rent and interest thereon, commencing six years previous to the filing of the cause petition in the proceedings mentioned, against which must be set off one fourth part of the fines and cost of renewal of said lease of the

fourth of the demised lands of *Carrickava*.
ever sum shall be found due to him on ts
account: and it is farther ordered, that the
mitted back to the Court of Chancery in
therein as shall be just and consistent with
these declarations, and this order."

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JACK BRISTOW - - - *Appellant.*
 [WHITMORE and Others - *Respondents.*

1881.
 ~~~~~  
 March 4.  
 April 30.  
 ~~~~~  
Ship.
Owner.
Master.
Lien.
Freight.
Mortgagee.

ship has no lien on the ship or freight for wages, or for
 future he may make in the ordinary discharge of his
 master, however necessary for the performance of the
 at the case becomes one of ordinary principal and agent,
 makes a special contract, in itself *ultra vires*, in order to
 he incurs special expenses: if the owner adopts the
 at contract, he must, in equity, also bear its burthens.
 efore, the master of an ordinary seeking ship entered
 r-party, under seal, to carry troops from the *Mauritius*
 and stipulated, on his own responsibility, in the char-
 at he would make certain alterations in the ship, in
 ble him to carry the troops, and at the *Cape of Good*
 d into another charter-party, not under seal, to a
 , and made the specified alterations, and paid money,
 lls to meet the expenses necessary to the making of
 ions, and the voyage was performed:

Equity, the master was first entitled out of the freight
 : these charter-parties to be repaid the sums advanced,
 demnified against the bills, and that the owner (or his
 was only entitled to the net freight after deducting
 :—(*Diss. Lord Wensleydale and Lord Chelmsford*).



he “*Kenilworth*,” an ordinary seeking ship, of
Towse, of *London*, was the owner, and the
 as master, was at *Port Louis*, in the *Mauritius*.
 -party, under seal, dated 19th *April* in that
 etween the Appellant and Commissary Gene-
 n behalf of the Lords of the Admiralty, the
 ndertook to convey certain officers and troops
Louis to *Gravesend*. The Appellant under-
 p the vessel, and to provide stores, &c., to the
 of a Board of officers. The gross sum to be

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paid to *Bristow* amounted to 2,138 *l.*; and “for the due performance, &c., of all the said agreements on the part of *Bristow*, he hereby binds and obliges himself, his executors, &c., and the said ship unto the Commissioners of the Admiralty in the penalty of 100 *l.* by these presents to be fixed and recovered.” The fittings up were made, and the provisions put on board at a cost of 810 *l.* 13 *s.* 9 *d.*, of which the Appellant paid from his own pocket 64 *l.* 17 *s.* 2 *d.*, and drew bills for the residue on *Towse*. The ship sailed, and on the homeward voyage touched at the *Cape of Good Hope*, and on the 27th *May* 1856 the Appellant entered into another charter-party with Mr. Commissary *Macgregor*, acting at the *Cape* on behalf of the Lords of the Admiralty, for the conveyance of other troops to *Gravesend*, for which the sum of 1,064 *l.* was to be paid. This charter-party was not under seal; the sum to be paid was not stated, as in the other charter-party, to be payable to *Bristow*, and there was no covenant by him to pay a penalty for non-performance. The fittings up and provisions put on board at the *Cape* came to 700 *l.* 15 *s.* 1 *d.*, of which the master paid out of his own pocket 27 *l.* 7 *s.* 9 *d.*, and drew a bill for the residue on *Towse*.

The ship arrived at *Gravesend* in *July* 1856, and the troops were landed; the sums due from the Admiralty were not then paid, as there were different claimants for them. In *April* 1855, *Towse* had mortgaged the ship, and that mortgage had become vested by assignment in two of the Respondents, *Robinson* and *Fleming*. In *July* 1856, *Towse* had made another mortgage of the ship to two other of the Respondents, *Morris* and *Towne*. On the 29th *October* 1856, *Towse*, the owner, was declared bankrupt. An action was brought by the holder of the bill given at the *Cape of Good Hope* against the Appel-

judgment signed thereon; the holders of the bills also threatened him with proceedings to be same.

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 }
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On 21st *May* 1857 the Appellant filed his bill (as afterwards amended) against *Towse*, his wife, and the mortgagees, setting forth the above facts, and praying to be repaid the sums he had advanced, to be indemnified against the bills he had drawn, and to have a full and complete relief. Answers were put in by the several defendants, and the Admiralty paid the money into court. The cause was heard before Vice Chancellor *Wood*, who, on 14th *February* 1859, made a decree declaring the Appellant to be entitled to the relief prayed (a). The Respondents appealed to the Lord Chancellor, Lord *Chelmsford*, who read the case, but delivered up the Great Seal without giving judgment, and, therefore, under the 15 & 16 Vict. c. 20 gave in his written judgment to the registrar, in which judgment the decree of the Vice Chancellor was not to be reversed, and the Appellant's bill dismissed with costs (b). The present Appeal was then brought.

H. Cairns and Mr. Baggallay for the Appellant:
 admitted as the general rule that the master has
 the freight for ordinary disbursements made
 ship, and therefore the authority of *Wilkins v.*
Wel (c), *Hussey v. Christie (d)*, *Smith v. Plum-*
and Atkinson v. Cotesworth (f), is not disputed;
 cases do not apply to the present. Here a
 contract, out of the ordinary course of the ship's
 service, has been made; to carry it into effect
 by one of the charter-parties, the master specially

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(d) 9 East, 426.

G. & Jo. 325.

(c) 1 Barn. & Ald. 575.

г. 101.

(f) 3 Barn. & Cr. 647.

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and personally bound himself in a penal sum to do), it was necessary to incur special expenses. By them he has introduced into the ship fittings up which are the property of the owner, and to do this he has made payments, and incurred liabilities. He is entitled to be repaid the former, and to be indemnified against the latter, for the owner has adopted the contract. If an agent, without express instructions or general authority enters into a particular contract, and incurs expense in fulfilling it, the principal may disavow it altogether; but if he accepts and takes advantage of the benefit, he must be treated as having authorised it from the first, and becomes subjected to its burdens, *Phene v. Gillan* (g) [Lord Chelmsford: The case was not argued before me as one out of the ordinary duty of the master; on the contrary, it was treated as one in which he had made these contracts under his ordinary authority.] They were contracts of a special nature, and on the first of these charter-parties the master alone could sue or be sued. It was a contract under seal, with a covenant rendering himself personally liable in a penal sum for non-performance. The owner might therefore have repudiated it and thrown the whole burden of it on the master, which he could not do with respect to an ordinary contract made in the usual course of a master's duty. The mortgagees stand precisely in the situation of the owner.

Assuming this argument to be correct, and the owner to have adopted the contract, then it is clear that the freight is primarily liable to discharge the expenses and the liabilities thus specially incurred, *Green v. Briggs* (h) [Lord Wensleydale: Freight is paid for the use of the ship as improved. It can make no difference that the

(g) 5 Hare, 1.

(h) 6 Hare, 395.

improvement is greater than usual.] This is a special contract; in one case the payment is to be made, not generally as is the usual course, but to the Appellant as owner, and in the other to himself by name. By adopting the contracts, the owner adopted these stipulations in them. If the payments were made to him, the master would have a right to deduct these disbursements.

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It was said in the Court below that the master might have met these extraordinary expenses by hypothecating the ship. That would have saved him from personal responsibility; but if he pursued the other and less expensive course, the course more beneficial to the owner, and the owner adopted what he had done, no question as to what might have been done by hypothecation can arise. On landing the troops at *Gravesend*, the freight on these special contracts was earned, and the master's right to indemnity was then complete, and could not be afterwards affected by the vessel earning other freight on its arrival in *London*, when it was taken possession of by the mortgagees.

Mr. *Amphlett* and Mr. *Honyman* (Mr. *Edward Macnaghten* was with them) for the Mortgagees :

The master has here no lien at law, *Hussey v. Christie* (i), *Smith v. Plummer* (j), *Atkinson v. Cotesworth* (k), and consequently none in equity, *Gladstone v. Birley* (l), *Buxton v. Snee* (m), for the payments he has made in cash, or for the bills. As to the latter, the holders of the bills ought to be parties to the suit. [The *Lord Chancellor* : But they may sue the master, and he asks for indemnity.] First, as to the right of

(i) 9 East, 426.

(j) 1 Barn. & Ald. 575.

(k) 3 Barn. & Cres. 647.

(l) 3 Maule & S. 205 ; 2 Mer. 401.

(m) 1 Ves. 154.

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the mortgagees. That is complete as against the owner and the master, *Willes v. Palmer* (n). The date of the first mortgage is previous to either of these charter-parties. The mortgage is not merely a mortgage of the ship, but of all charter-parties. The mortgagees would have a right to take possession of the vessel before any freight was paid, and then, notwithstanding the 6 Geo. 4, c. 110, s. 45, the accruing freight would pass to them, *Kerswill v. Bishop* (o). That case proceeded on the analogy to the mortgagee of real estate, who may enter and take the benefit of growing crops without making any allowance for the expense incurred in raising them. The person who becomes tenant after the mortgage cannot be in a better situation than the mortgagor himself; if so, the mortgagor's agent cannot. [The *Lord Chancellor*: But if the mortgagee seeks the advantage of a particular contract, must he not ratify the contract and indemnify the maker of it?] He need not. That does not alter his rights. The owner may be bound to do so, but the mortgagee is not. Till the mortgagee takes possession, the master is not his agent. The master has no lien on this money: otherwise, it is possible that the money might be affected in the hands of the mortgagees. In *Gibson v. Ingo* (p), it was held that the master of a ship had no lien on the certificate of registry, or on the accruing freight for monies disbursed by him for the ship's use; and farther, that shipbrokers advancing monies to the owner for the ship's use, having notice of a prior mortgage on the ship, are not entitled to be repaid their advances in priority to the mortgagee, although the mortgagee does not take possession of the ship until after it has entered the docks on the homeward voyage.

(n) 7 Com. Ben. Rep., N. S.,
 340.

(o) 2 Crom. & Jerv. 529.
 (p) 6 Hare, 112.

That puts an end to the argument here, that the master's rights were complete on landing the troops at *Gravesend*, and that the mortgagee's rights were not complete till the arrival at the docks. The principle that there is no right in a master to a lien on the freight for his ordinary disbursements has been admitted on the other side. But neither can he sue on a bill given for the value of the ship itself, *Lister v. Payn* (q). Both the ship and the freight belong to the owner, the one as incident to the other, *Morrison v. Parsons* (r). A master can only deal with the ship in the usual way, *Stainbank v. Fenning* (s); he might have hypothecated the ship; and *Walshe v. Provan* (t) shows that no right can accrue to the ship's agent, and *à fortiori* none to the master, from making the freight payable to himself. There the ship's agent in *Canada* having procured a charter for a vessel, the owners of which were indebted to him on account, made the freight payable to himself, and deducted out of it the money due to himself. It was held that the owners could recover back the amount either in a special action or in the general form of assumpsit for money had and received. There is no real distinction, so far as this case is concerned, between the charter-party under seal and the one not under seal. As to the former, nobody but the master could bring the action; as to the latter, the owner might sue on it; but these are mere matters of form, and cannot affect the legal rights of the owner. The mortgagee's title is certainly preferable to that of the master, for it is the title of the owner himself, on whose behalf and for whose benefit the

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(q) 11 Sim. 348.

son v. Chapman, Id. 696.

(r) 2 Taunt. 407. See *Stewart v. The Greenock Insurance Co.*, 2 H. L. Cas. 159; and Ben-

(s) 11 Com. Ben. Rep. 51.

(t) 8 Exc. Rep. 843.

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master must in each case maintain the action. *Griggs* does not decide this case, for that was a question as to arranging the accounts in a partnership.

Then it is contended that these charter-parties not made in the ordinary discharge of the duty of master, that in fact they are *ultra vires*, and therefore the ordinary rule of law does not apply to them. To allow the argument would be to found the right of the master on the violation of the duty he owed to his employer.



Such an argument cannot be permitted. But in truth there is no foundation of fact on which it can be made to stand.

It was in the ordinary discharge of the master's duty to obtain employment for the ship by carrying goods and passengers, and it can make no difference that those passengers were troops, and that on account of their numbers extra fittings up were required of a sort different from those needed for ordinary passengers.

Sir *H. Cairns* replied.

The Lord Chancellor (Lord *Campbell*):

30 April. Having very attentively considered this case, and since the argument at the Bar, I now take the view of it as the *Vice Chancellor*. The Plaintiff's case is most reasonable, and natural justice requires it should be conceded. Still, if it is opposed to any established rule of law, or if it can be admitted only by finding a nice and subtle distinction between this case and former decisions establishing a settled rule, it ought to be disallowed.

But I am of opinion that the Plaintiff in the present suit cannot be considered the master of a ship asking a lien on the ship or freight, for his wages or his or his crew's disbursements as master. He is an agent who,

with perfect good faith for the benefit of his principal, has in the performance of a contract which his principal has ratified and adopted, laid out sums of money, and made himself personally liable for other sums of money, and who seeks to be repaid and indemnified out of a fund which is produced by the contract, and was to come into his hands.

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This case seems to me to be very different from *Hussey v. Christie* (*u*), *Smith v. Plummer* (*v*), and the other decisions relied upon by the counsel for the Respondents. "Here" (according to the summary of the case given by the *Vice Chancellor*) "the expenses incurred by the master were entirely and simply in fulfilment of the charter-parties he had concluded on behalf of the owner to fit up the ship in a specified manner. It was not the ordinary case of expenses in certain general repairs to the ship in order to enable her afterwards, on a charter-party being made, to earn freight, nor was it the ordinary payment of wages to the crew while earning the freight under the charter-party. It is a specific part of the charter-party that certain fittings shall be provided and certain provisions supplied. The master has bought this property on behalf of the owner."

It is admitted that the owner, if solvent, would be liable in an action brought against him by the master for the amount of these disbursements, and of the bills drawn by the master upon the owner which the owner accepted. But as by the terms of the charter-parties the master was himself to receive the freight, has he not an equitable lien on the fund before it comes into the owner's hands? This fund is the produce of the advances of the master, and of the money raised by the bills of exchange

(*u*) 9 East, 426.

(*v*) 1 B. & Ald. 575.

the amount of the freight, minus the deduction of the master's disbursements and liabilities under the bill of lading.

To have the benefit of this deduction, there must have been no occasion for a plea of set off, the money had and received being, (as Lord Mansfield accustomed to say), in the nature of a bill. The money being received by the master, he had a legal lien upon it in his hands; I think an equitable lien upon it (that is to say, he has a right to be paid out of it) while it was in the hands of the Lords of the Admiralty, as stake holder when it has been paid by them into court.

If such would have been the rights of the master between him and his solvent owner, can they be prejudiced by the mortgage of the ship or the subsequent bankruptcy of the owner? Neither the mortgagees nor the assignees of the bankrupt can claim more than what the master was beneficially entitled to in the bankrupt; and only a right to the freight subject to the mortgage, legal or equitable, or (in other words) subject to the right set up by this bill, that out of the freight the master should be paid and indemnified.

Neither want of prudence nor of good faith

safely resorted to. But if this course would have been both safe and practicable, why was he not to avail himself of the means he enjoyed of raising the money without paying maritime interest, and incurring the heavy expenses of hypothecation? The owner could not complain of a proceeding which was more advantageous to him, and still less can the mortgagee whose prior incumbrance would have been postponed to the bottomry bond.

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In short, it seems to me that the Plaintiff's claim rests on the well established general principles of the law of principal and agent, and that it is not opposed by any case hitherto decided.

I must express this opinion with diffidence, knowing that it is contrary to that of a noble and learned Judge whose authority I so much respect; but entertaining it very clearly, it is my duty to offer my humble advice to your Lordships that the decree appealed against be reversed.

Lord Cranworth :

If the question in this case had been, what it was supposed to be in the argument below, namely, whether the master had a lien on the freight of the ship for expenses and liabilities incurred by him in fitting it up and in providing necessaries for the voyage, I should have agreed with my noble and learned friend whose decree is now under review, that the equity insisted on did not exist. The law has long been settled that the master has no lien on the ship or freight for his wages, or for any ordinary expenditure he may have made, however necessary that expenditure may have been; and a court of equity cannot on such a point go beyond the law. But the question here is not as to the master's right by

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way of lien on the general freight, but as to his rights under the two contracts entered into by him.

The question is whether the Respondents, now claiming under the owner, can insist on receiving from the Admiralty the gross sum payable by that Board free from all charges upon it; or whether out of that gross sum the Appellant is not entitled to be indemnified in respect of the outlay and liabilities incurred by him under the two contracts. My opinion is that the Respondents are only entitled to the net amount, after satisfying all claims of the Appellant in relation to the fitting up of the ship, and providing necessaries for the voyage, as far as relates to the two contracts.

The ground on which I rest this opinion has no reference to any law peculiarly applicable to shipping. My conclusion would have been the same if the contracts had been to do any other act as agent for another person.

The principle which must, I think, govern this case is one of universal application; namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens. The contract must be performed in its integrity. Here the Appellant, as agent for the owner now represented by the Respondents, stipulated for certain benefits in consideration of certain burthens which he undertook to bear, and certain labours which he undertook to perform. If he had authority to enter into such a contract, the principal is of course bound. If he had not authority then the principal may repudiate the contract; but he cannot take that part of it which is beneficial to him without performing that which is onerous.

The fallacy of the argument of the Respondents lies

n treating the lien claimed by the Appellant as a lien on the freight of the ship. It is no such thing. Such a lien, if it existed, would extend to the freight payable in respect of the merchandise on board, as well as to the sums payable by the Admiralty under the contracts. But on that freight the Appellant has no claim. His rights are confined to that which is the fruit of the contracts into which, on behalf of his owner, he, whether with or without authority, entered.

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According to the true construction of the contracts, the person who was to receive the benefit of them was the same person who was to bear their burthens. If the owners were the parties to receive, they were the parties to pay.

Suppose that the contracts had expressly stipulated that out of the gross sums payable the master should be reimbursed his outlay, and that the balance only should be paid to the owners; in such a case the right of the master would be clear. I see no difference in principle between that case and the present. The right of the master is, I think, implied, though not expressed.

On the first contract the Appellant must have been the party to sue for the gross sum payable under it. That amount could only have been recovered from him by a suit in equity; and in such a suit he would surely have been allowed to retain all the outlay he had properly made under the contract for his employers.

The second contract was not under seal, and therefore the owners might themselves have sued and recovered the whole sum payable. But I think that on the most obvious principles of justice the Court of Chancery would in such a case, if a court of common law would not, have given to the Appellant the same relief by way of lien on

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the contract to which he would certainly have been entitled if it had been under seal.

The circumstance that the Board of Admiralty, as representing Her Majesty, was the party liable to make the payment in this case, does not affect the principle on which the decision must turn. The decision must be the same as it would have been if, instead of contracts to convey troops for the Crown, the contracts had been to convey workmen for some great railway contractor.

On this short ground I think that the decree complained of ought to be reversed, and that the decree of the *Vice Chancellor* was right.

Lord *Wensleydale* :

. My Lords, I am of opinion that the decree of my noble and learned friend the late *Lord Chancellor*, ought to be affirmed.

Two charter-parties were entered into by the Appellant, one of them under seal, the other not under seal. If those charter-parties, and the payments thereon, had been transactions out of the course of the usual employment of the ship without the authority of the owner, express or implied, the owner might either have sued him for breach of duty, or might have ratified his unauthorised acts; and if he choose to pursue the latter course, and adopt the charter-parties as made on his behalf, I do not mean to say that he at the same time would not have been bound to relieve the master of the burden which he incurred in entitling himself to receive the payments under the charter-parties. The maxim of "*qui sentit commodum sentire debet et onus*" may apply to such a case.

But these charter-parties were assumed in the argu-

ment in the court below, before the late *Lord Chancellor*, to have been made in the due course of the employment of the ship by the master, and by the owner's authority, and treated as such; and no doubt it was so. There is no averment in the bill, or suggestion on the evidence, that they were entered into contrary to the expressed or implied authority of the owner; and if that was essential to support the Appellant's claim, on the above-mentioned principle, that fact should have been averred and proved. We have then to determine whether if these charter-parties were made in the due course of the employment of the master, he had any claim on the money payable under them. I am of opinion that he has no claim.

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We suppose then, that the owner gives the master directions to navigate his ship on a seeking voyage, to take on board goods at any port to be carried to another, to take troops and passengers with or without the duty of provisioning them, and carry them anywhere he thought proper, or to sign bills of lading or charter-parties, under seal or not under seal, on behalf of his owner; would the master have had any right to recover upon the bills of lading or charter-parties, or to receive out of the money recovered thereon, the amount of his payments, or debts or liabilities incurred by him, on behalf of his owner? If he had no lien upon any of those instruments, or the money due upon them, I cannot see what right he has.

Now it is perfectly clear that he has no lien on the ship for his wages or disbursements, because he holds it merely as the servant of his master, the owner, and he has no possession of his own, as against him, and therefore no lien. The law to this effect has been perfectly settled by the case of *Hussey v. Christie (w)*. By parity

(w) 9 East, 426.

that freight cannot be earned without incurring the expenses in fitting up some portion of the ship in a particular manner for the proper stowage of the goods, in employing and paying extra men to secure and stow them; the amount to be paid for freight being calculated to cover not merely the ordinary expenses of stowage, and a proportion of the wages, but also these extra expenses. I take it to be clear that the master should not hold the bill of lading against his owners to reimburse himself what he has paid for these purposes. He could have no legal or equitable claim to have the freight analysed, and have a part set aside for himself. The freight, or ship's earnings, and all equally the property of his owner, which the master cannot detain from him. Suppose the goods carried are cattle, which require feeding, and the master in taking his bill of lading stipulates for a larger sum, undertaking to supply food, and to use his own money to buy it. I take it to be equally clear that he has no lien for that sum, though necessary to earn the freight; nor would it make any difference in the instrument or agreement by which the freight is stipulated contains also the agreement to provide the food. All is freight, all ship's earnings, all are the property of the owner, and he has no lien or claim upon any part of it.

In the case of a claim for the passage-money for passengers taken on board, I conceive it clear that the same principle applies. It makes no difference that some additional expenses were to be incurred, nor that they are stipulated by the contract; the passage-money is the ship's earnings, and belongs to the owner, without any lien on part of the master.

The like reasoning appears to me to apply to cases of freight earned by charter-party. The money to be re-

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ceived, though there is something stipulated to be done besides the mere carriage of the goods in order to obtain it, is a part of the ship's earnings, is all under the description of freight; and the master of the ship being a mere servant, and acting for the benefit of the owner, has no claim upon it.

The fallacy of the argument on the other side consists in taking the balance only, after paying all expenses necessary to earn the freight, as freight. I conceive that the whole sum to be received is the freight—it is the ship's earnings; and as in the simple case of freight due on a common bill of lading, you never deduct a proportionate part of the wages of the crew whose service is necessary to earn it, nor of additional aid from strangers in the shipping or conveying, nor of additional bulkheads or other alterations necessary to perform the contract on behalf of the owner, and allow the master a lien *pro tant*, but treat all as freight: so you ought in a more complicated agreement by charter-party to treat all as provisions necessary towards earning the freight. The sum received on the charter-party is all freight, all the ship's earnings, and not one part repayment of expenses, and the rest freight.

It is very true that on one charter-party, that under seal, the master alone could sue; but he sues as agent, for and on behalf of his employer, the owner, on that instrument, and has no right to claim, as against his employer, any part. By taking the security under seal to himself, he cannot give a right to a lien on the freight which the relation between himself and his owner disallows. If he recovers the amount, the owner may sue for it, and the master may set off the sums paid; but that is not because any part is his own, or he has a right to hold it, but because the law allows a set off of one debt against another

or the obvious purpose of avoiding circuitry of action. It could not be deducted unless under a plea of set off.

I think it therefore clear, that the master has at law no lien upon the ship or upon the freight, whether receivable under an ordinary bill of lading, or under a simple charter-party, in the master's or the owner's name, or under one which stipulates that certain expenses should be incurred preparatory to the service contracted for, as in this case.

As far as relates to freight the term "lien" is a figurative expression, meaning that he has a right to insist upon receiving it himself, or, when received, to retain any part to pay his wages, or repay his disbursements.

This rule of law has been established for very wise reasons, in order to preserve the legal possession of the vessel and its control and management, and its earnings, all times to the owner, which would be seriously interfered with if the master, who is a mere servant and not agent, in the more extended sense of the word, could detain either the ship or its earnings, on pretence of any claim of his own.

If this be the law, and it is not to be disputed, it governs the relation of employer and servant. Both know that under the ordinary contract of employment the master has no right to detain the freight to satisfy any debt to him from his employer, and it would be against the implied contract between them for the servant to set up such a claim.

I understand that my noble and learned friends admit that at law the master has no claim on the ground of a lien, but insist that he has an equitable claim in this case to have, out of the sum paid into court by the Lords of the Admiralty on the contract made with them, as agent for the owners, so much as he has expended in performing the condition on which it became due.

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ments of any kind. There seems to me to be no principle in such a proposition, nor has any authority been cited to support it.

If the parties, owner and servant, had agreed to allow such a right to detain the ship on any course it would have been valid; but if there was no agreement, it seems to me an extraordinary proposition to say that the master could so give it to him and indeed against, the consent of the owner and employer. If, indeed, he were to make a special contract with the freighter, that the amount of the freight expended should be paid to him, not to his owner, but to the freighter, so that as to that part of the stipulation for carriage the contract was with the master, the owner would have no claim on that part; the freighter alone could recover it on his own account, and the master could look to his owner for reimbursement, because for an advance of money would not have been made by his owner. It is not very likely that it should be the ordinary course that the master would pay a stranger rather than his own employer. However, even if there is no such contract—it is merely in the behalf of the owner, in the master's name—if the master expended any money in performing his duty, made in behalf of the owner, he would have a

not discover any principle which should give him any equitable claim for it.

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Lord *Chelmsford*:

My Lords, I should feel great doubt as to the propriety of my decision in this case, opposed as it is to the opinions of three of my noble and learned friends, for whose judgment I entertain the most sincere respect, if it were not sanctioned by my noble and learned friend (Lord *Wensleydale*), whose high authority upon every branch of law has been so long and so justly acknowledged. After again carefully considering the subject, I still think that the view which I originally formed, and which my noble and learned friend has so clearly and so strongly maintained, is the correct one.

It is necessary to bear in mind, that upon the argument before me it was not disputed that the master had authority to engage the vessel for the purpose of carrying troops, and that it was necessary to fit and victual the vessel in a proper manner for that purpose. This will appear from the report of the case; and my judgment proceeded entirely upon this ground. I advert to this in the outset, because both my noble and learned friends who have addressed your Lordships, appear to me either to have overlooked this admission, or not to have given sufficient effect to it. My noble and learned friend, the *Lord Chancellor*, asks whether the owner can seek the benefit of the contract which he has *adopted*, and repudiate that term of it by which the master was to receive the freight from the Admiralty? But if the master was acting within the scope of his authority in entering into the contract, it is incorrect to talk of the owner having adopted it; he is bound by it the moment



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it is concluded by his authorised agent, and he has no option on the subject. My noble and learned friend (Lord *Cranworth*) says, "If he (the master) had authority to enter into such a contract, the principal is of course bound. If he had not authority, then the principal may repudiate the contract; but he cannot take the part of it which is beneficial to him, without performing the part which is onerous." Upon which it may be observed that the latter alternative is excluded by the admission that the master had the requisite authority; and as to the former, the question in the case is not whether the owner was bound by the contract (which it is agreed that he was), but what were the rights of the master under the contract, by which, as an authorised agent, he bound his principal? If the master had exceeded his authority in entering into the contract, I should have agreed with my noble and learned friends that as the owner, if he pleased, might repudiate it, if he chose to adopt it he must take it as a whole, and that he was not at liberty to accept the benefit and refuse the burthen.

My noble and learned friends say that this case must be determined upon the general law of agency, and that the Appellant cannot be considered as the master of a ship asking for a lien on the ship or freight for his wages or his ordinary disbursements as master. But I would respectfully ask why, if the authority for entering into the contract was that which was conferred upon him by the owner having appointed him to be the master of the ship, *that* only agency which could possibly exist between the parties is to be excluded? The agency of masters of ships differs from that of other agents in this respect, that those agents when they have expended money upon any thing at the request of the owner, are entitled to retain



it until their demand is satisfied ; but the law of England, into the policy of which it is useless to inquire, refuses to the master of a ship any lien, either upon the ship or the freight, for disbursements which he has made, or for liabilities which he may have incurred, towards the prosecution of the voyage for which the ship is engaged.

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But it is said that the payments made in this case, and the liabilities incurred, were not of the character of ordinary disbursements. And my noble and learned friend, the *Lord Chancellor*, quotes with approbation the distinction asserted by the *Vice Chancellor* between this and the former cases in which the master's lien was denied. His Honor says it was not the ordinary case of expenses in certain general repairs to the ship in order to enable it afterwards, on a charter-party being made, to earn freight, nor was it the ordinary payment of wages to the crew while earning the freight under the charter-party. I have endeavoured over and over again to comprehend the distinction which is here relied upon. Is it incorrect to say, that where a person has authority to enter into an agreement on behalf of another, he has incidentally also the power to bind his principal to things which are necessary for the performance of that agreement ? The ship was here engaged by the authority of the owner for a special service which could not be accomplished without an alteration of its fittings. What reasonable distinction can be suggested between disbursements which are made to adapt the ship to this particular voyage, and an outlay upon repairs, or money expended for stores or provisions upon any other voyage for which the ship may be engaged.

My noble and learned friend, Lord *Cranworth*, considers that there is a fallacy in the argument of the



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Respondents, in treating the lien claimed as a lien upon freight. He says, if it was it would extend to the freight payable for the merchandize on board; but that the Appellant's rights are confined to that which is the fruit of the contracts which on behalf of his owner he, with or without authority, entered into. It is quite immaterial by what name the money upon which the claim arises is designated; whether it is to be called freight or passage-money, or more generally "the earnings of the ship." The same rule will apply, and the master can have no specific claim upon it as against his owner to whom it belongs under the contract.

It is unnecessary to consider what would be the rights of the parties either upon the receipt of the freight by the master, or in the event of an action being brought upon the contracts, because we are dealing with what must be regarded as unpaid freight, upon which the respective rights of the parties are to be determined. The mortgagees of the ship claim the amount without any deductions; the master insists that he is entitled not only to be repaid out of the money the sums which he disbursed, but also to be indemnified out of the same fund against any claims and demands upon the bills by which he incurred liabilities for the owner. He is virtually therefore claiming a lien upon this portion of the earnings of the vessel. It seems to be considered by my two noble and learned friends that the master has in this case an equitable right to be reimbursed and indemnified out of the monies brought into court, as distinct from a claim of lien at law. But I cannot find, however reasonable and consonant to natural justice it may appear that the master should be protected against liabilities which he may have incurred in respect of a contract entered into



for the benefit of his owners, that equity ever interposed in his favour on this ground. And it appears to me that it would make a serious inroad upon the doctrines of the law as to the relation of owners and masters of ships, if where the law says the master shall have no lien, equity were to step in and give him one.

The case of *Hussey v. Christie*, which is very like the present, seems strongly to repudiate such a distinction between law and equity. There a bill was filed by the master of a ship to restrain the assignees of the owner from disposing of the ship and cargo until his claim upon certain bills of exchange, which he had drawn for the purpose of raising money for the repairs of the ship, was not satisfied. The *Lord Chancellor*, considering it to be entirely a legal question, sent the case to the Court of King's Bench for the opinion of the judges, who certified that the master had no lien for the debts thus incurred, which appears to have settled the question in equity.

As I have already stated, I can see no sound distinction between disbursements of one sort or another where they are equally necessary to the performance of the particular voyage contracted for. Nor does there appear to me any ground for saying that there is a difference between the legal and the equitable rights of the master under contracts entered into which are binding upon the owner. And therefore I can see no sufficient ground for changing the opinion which I originally formed upon the case, and I think that the decree ought to be affirmed.

Lord *Kingsdown* :

My Lords, it is impossible for me not to entertain great doubts in a case on which opposite opinions have been expressed by my noble and learned friends, and

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especially when my noble and learned friend who decides this case below adheres, on reconsideration, to the judgment which he then pronounced, a circumstance which adds to, instead of diminishing the weight of his authority.

On the general rules of law there is no difficulty. It is clear that the master of a ship has not, by law, any lien upon the freight for advances which he may make on account of the ship. On the other hand, it is equally clear that if a trustee incurs expenses in the execution of his trust, he is entitled to retain them out of the trust property. If an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot at once approbate and reprobate it. He must adopt altogether or not at all; he cannot at the same time take the benefits which it confers, and repudiate the obligations which it imposes.

In this case the master of the ship makes a contract on behalf of the ship, which as it seems to me was, *prima facie*, *ultra vires*. He could not, I think, by virtue of his general authority as master, engage to alter the ship and bind his owners to pay for the alteration. He does however, undertake to do so: he incurs very heavy expenses in the alterations, and enters into engagement for paying the expenses to be incurred in provisioning and conveying large bodies of troops, and for the performance of those engagements he binds the ship, or, in other words, the owners.

The contract is performed. To be a beneficial one must of course cover all the expenses incurred in performing it, including the expenses of the alteration. The owner, or what is the same thing, the mortgage adopts the contract; and what he now insists on is effect a right to receive the money earned, leaving the



agent to pay the expenses by which the earnings were acquired.

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It is said that the master must be presumed to have had authority to make the contract; if he had, that circumstance would in my mind make no difference, for he would equally be entitled in that case to the rights which I think the contract gives him.

Upon one of these contracts, that which is under seal, the money earned could have been recovered only in an action brought in the name of the master; and I have no idea that if the master had received the money, or had been required to permit the use of his name for the purpose of recovering it, a court of equity would have afforded any assistance to the owner, except upon the terms of fully indemnifying the master against all the payments which he had made, and all the liabilities which he had incurred.

Upon the whole, it seems to me that the judgment of the *Vice Chancellor* was correct.

Decree or Order appealed from varied; cause remitted with declaration.

Lords' Journals, 30 April 1861.

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March 19, 21,  
April 20.

H. E. HALL - - - - *Appellant.*

W. H. WARREN - - - - *Respondent.*

*Will.*  
*Gift over.*  
*Mortmain.*  
"So."  
"Said."

In construing the autograph will of an illiterate man, the usual meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out.

A testator gave all his real and personal estate to his executors: they mentioned a specific house, 71, *Queen's Road, Bayswater*, which he gave to the inhabitants of *B.*, to found a charity, directed the executors to call a meeting of the inhabitants, to appoint trustees to carry his scheme into execution, named his godson, *W. H. W.*, to be one of the trustees, leaving to the inhabitants to choose as many more as they pleased; and then said, in the event of the inhabitants not being willing to carry out the scheme, "I will that all my *said* property so given to said charity shall absolutely belong to my said godson, *W. H. W.*" He afterwards made some pecuniary gifts, and devised leasehold and freehold houses for life to different persons; each house, on the death of the devisee, being given to the "residuary legatee or legatees" for the charity. As to one freehold house alone, 4, *Douglas Place*, there was a gift of it to *W. H. W.* for life, then to the trustees of the charity; but should there be no charity established, then to *W. H. W.* absolutely. The gifts to the charity being contrary to the Statute of Mortmain, no meeting of inhabitants was called, nor were any trustees appointed:

Held (*Dub. Lord Wensleydale*), affirming the decree of Vice Chancellor *Wood*, that on the general failure of the gift to the charity, the gift over took effect; and therefore, in the case of the house No. 4, *Douglas Place*, *W. H. W.* became entitled to it absolutely. But Held also, so far reversing the decree of the court below, that *W. H. W.* was only entitled, in addition, to the house 71, *Queen's Road, Bayswater*, for that the words "all my *said* property so given" must be restricted to that house, and did not affect the general property of the testator, as to which he must be treated as having died intestate.

The *Attorney General v. Hodgson*, 15 Sim. 146; and *Philpott v. St. George's Hospital*, 21 Beav. 134, questioned. The costs were ordered to come out of the estate.

—  
*WILLIAM HALL*, of 71, *Queen's Road, Bayswater* (a person possessed of considerable real and personal property, but very illiterate), made his own will. It was



ated 17 *January* 1853, and the parts material for consideration were in the following terms: "I will and be-  
neath all my real and personal estate, of whatever kind  
may be possessed of, to *William Unsworth* of &c.,  
Mr. *John Atkinson* of &c., to be my executors of this my  
will. And I do appoint the said Messrs. Unsworth and  
Atkinson, their executors, &c., my executors and admi-  
nistrators to this my will."

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"I will that my freehold house, No. 71, *Queen's Road, Bayswater*, be given to the inhabitants of *Bayswater* to found a lying-in assilem for unmarried whomen, or poor married whoman, if there is more than three beds to spare. I will that there shall be no paid parson, priest, or chap-  
lin whose services is not given gratis, attend the said assilem. I will that the same be cald *Hall's Maternal Assilem for Unmarried Whoman*. I will that my said executors do call a meeting of the nabours and enabitants of one mile round the said house, as soon as convenient, to appoint a committy and trustees to carey out the same. I doo appoint my godson *Wm. Hall Warren* one of the said trustees, leaving to the enhabitants to make choice of as maney more as they may please. But in the event of the said enhabitants not appointing a committy, or not willing to carey out the same schem, I then will that all my said property so given to said Maternal Retreat or Lying-in Assilem shall absolutely belong to my said godson *William Hall Warren*. And I will that the deeds of said house be given to said trustee or trustees. I will that said trustee or trustees be my residarey legatees to this my will." He then gave certain specific legacies of money; then he gave unto "*Mary Ann Hall* my freehold house, No. 10, *Pickering Place, Bayswater*, for her natural life, and after her decease to my residuary legatees or legatees for asylum above mentioned." This



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sort of bequest was several times repeated, as to other houses and other persons (one of the instances was a gift of 6, *Pickering Place*, to *W. H. Warren*) in the same words. The will then went on: "I will that my freehold house, No. 4, *Douglas Place, Bayswater*, unto *Wm. Hall Warren* for his natural life, and after his decease to the trustees of the Retreat, Maternal, above named, and should there be no such trustees, then I give the same absolutely to the said *Wm. Hall Warren*." He then gave other pecuniary legacies; then a house for life to *Henry Hall* (then in *Australia*), and after to the trustees of the asylum; then other houses to the trustees, and 10 l. to each of his servants.

The testator died 23 October 1856. A suit was instituted on behalf of *Henry Edward Hall*, the testator's heir at law, and the prayer of the bill was that it might be declared that the devise of the testator's freehold house, No. 71, *Queen's Road, Bayswater*, for the purpose of founding a lying-in asylum, and the several other devises and bequests for the like purpose, in the testator's will contained, were illegal and void, and that the testator died intestate as to the real and personal estate included in the said several devises and bequests; and for direction accordingly.

Preliminary inquiries were directed, and the chief clerk made his certificate as to the particulars of the estate of the deceased, and to the fact that no meeting of the inhabitants had ever taken place. The cause came on before Vice Chancellor Sir *W. P. Wood*, who on 16 July 1858 made a decree declaring that the gift over took effect, and that *William Hall Warren* was entitled to the whole of the residuary real and personal estate of the testator, including 71, *Queen's Road*, and 4, *Douglas Place*, and other the freehold and leasehold



houses devised for the purposes of the Maternal Retreat, subject, &c. to the life interests therein.

The appeal was against this decree.

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Mr. *Roundell Palmer* and Mr. *Osborne* for the Appellants :

Nothing goes over to the Respondent, *W. H. Warren*, upon the failure of the charity, for the gift over is only according to the words in the will to take place on the refusal of the inhabitants to appoint a committee, or to carry out the scheme. That is a condition, and it has not been performed. This resembles the case of the *Attorney General v. Hodgson* (a), where the testator only spoke of the gift to the charity not being conveniently carried into effect; the gift was void, as being contrary to the Mortmain Act, and the gift over failed. *Philpott v. St. George's Hospital* (b), is to the same effect. So are *Swayne v. Smith* (c), and *Williams v. Chitty* (d). The testator here having specified this one cause of failure, no other can be added for the purpose of effectuating the gift over. An alternative gift over cannot take effect by implication if a previous positive gift over does not. That is a principle on which *Wing v. Angrave* (e) must be taken to have proceeded. Here, too, the condition on which the gift over was supposed capable of failing has never been performed. No meeting has been called, and there has not been any refusal of the inhabitants to carry the scheme into effect. The person claiming the gift over must show his title to it; he cannot claim in disherison of the heir unless by doing so. [The *Lord Chancellor*: Is that always so? In *Jones v. Westcomb* (f), the event, & words provided for, did not happen, yet the gift over

(a) 15 Sim. 146.

(e) 8 H. L. Cas. 183.

(b) 21 Beav. 134.

(f) Prec. in Ch. 316. 1 Eq.

(c) 1 Sim. & St. 56.

Cas. Abr. 245.

(d) 3 Ves. 545.



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was held good]. Substantially the event there proposed did happen; there was a failure of issue, though in the form anticipated. Here the failure took from something which was quite different in substance from that which had been anticipated. The difference explained by Lord Chancellor *Brougham* in *Mac v. Sewell* (g), where he was commenting on *Jo Westcomb* and *Murray v. Jones* (h). And in *W v. Chitty* (i), where the two states of circumstances could not be treated as being the same in substance, it was held that the gift over did not take effect.

But assuming that the gift over may take effect in case of a general failure of the charity, then it is clear that the only property (in addition to the house in *Douglas*) which the Respondent can claim on such failure is the house No. 71, *Queen's Road*. That house is the other property distinctly given to the Respondent charity should not be established; it is the only property given to the Maternal Retreat previously to the execution of the gift over, and it is specifically and exclusively referred to by the words "my *said* property given" to the Maternal Retreat. In true construction of language, those words can only apply to that house, for none other had then been given to the Respondent. The gift in the first clause of the will of all his property to his executors, and the subsequent constituting of his residuary legatees, cannot extend the force of those words, for it is to be observed, first, that, after he thus disposed to his executors of all his property in substance, he gives away every particular portion of it to several legatees; and next, that money, which is part of a general gift, is also specifically given, and of course is to be given away for ever. His intention was that all his property after the life interests in them had expired, should

(g) 2 Myl. & Ke. 215. (h) 2 Ves. & B. 313. (i) 3 Ves.



applied to the purposes of the Retreat, but he never provided for the disposal of them in any other manner. As to them, therefore, the charity having failed, he must be taken to have died intestate. There is here no express gift over of the general residue, and none can be implied. To imply one, would be to make a new will for the testator.

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Mr. *Rolt* and Mr. *De Gex*, for the Respondent:

The whole scheme of the will must be considered. Being so, it is clear that the whole of the property given to the Maternal Retreat was intended, if that charity could not be established, to go to the Respondent. The words here are sufficient to exclude the claims of the heir and next of kin. The *Attorney General v. Hodgson* and *Philpott v. St. George's Hospital* cannot be supported. But *Abbott v. Middleton* (j) is a decisive authority that words as they stand in a will need not necessarily be taken as they stand, but may be transposed, or rejected, or others supplied, so as to effectuate the intention of the testator. Here the Respondent was specially appointed by the testator to be one of the trustees of the intended charity. If no others were appointed, the charity was to fail, and then all the property would go to the Respondent. No other trustee was appointed. He takes the residue as trustee; it is vested in him. [The Lord Chancellor: He is called trustee, but that is merely his designation as a person to carry the charity into effect. If there is no charity there is no trustee.] The charity is to fail if no others are appointed; but that one is appointed at all events, and the property is vested in him. The intention is shown beyond all doubt by the devise of the house, 4, *Douglas Place*, which is given to

(j) 7 H. L. Cas. 68.



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the Respondent for life, at his death to the trustees, but if there shall be none, then to the Respondent absolutely. This was the whole scheme of the will, and to declare the testator intestate as to the property intended to go to the Retreat, would be to defeat the general intention of the will, an intention shown not only in the general words, but specially manifested in this particular devise. The whole purpose was gift to charity or gift to godson. The testator never intended the Respondent to be a trustee for the next of kin, but only for the charity, and if that could not take effect, the property was to devolve on himself.

As to the other point, *Wing v. Angrave* does not affect this case. There it was held that you might reject one alternative without adopting another, for there might be a third proposition arising on the failure of either of the other two, and as to that third there could be no proof whatever whether the event had occurred. But *Abbott v. Middleton* showed that the whole scheme of the will was to be considered, and particular expressions in it so construed as to give it effect.

Mr. *Palmer*, in reply :

*Abbott v. Middleton* is not in point. There the will began with a clear gift, which was not afterwards as clearly taken away. There is nothing of the kind here, as to the whole property, which was not given to the Respondent, but to the trustees of the will, and if the inhabitants had declared their willingness to carry the scheme into effect, but had not appointed additional trustees, there would not have been any forfeiture. There is no distinction in the will between the Respondent and the other trustees; he is merely the one appointed by the testator; the others are to be appointed by the inhabi-



nts. That the testator made no distinction between  
em is shown by the often-repeated phrase "trustees  
med for the said Maternal Retreat."

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The Lord Chancellor (Lord *Campbell*):

My Lords, the first question which arises upon this  
peal is "whether, according to the true construction of  
e will of *William Hall*, the gifts over to the Respon-  
nt *W. H. Warren*, comprehend more than the two  
uses, No. 71, *Queen's Road, Bayswater*, and No. 4,  
*Dundas Place, Bayswater*, expressly devised to him upon  
contingency connected with the charity which the  
tator wished to found."

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The *Vice Chancellor* has decided that such gifts over  
nprehend the whole of the testator's residuary real  
d personal estate.

The testator appears to have been an exceedingly  
terate man; and the rules of grammar and the usual  
aning of technical language may be disregarded in  
nstruing his will. But we cannot strike out from his  
ll any word which, standing where it is, has a clear and  
finite operation in the disposal of his property.

The will contains these provisions [His Lordship read  
em. *See ante*, p. 421].

It is said that by the words in the will all his real and  
ersonal property first given to trustees and not after-  
ards specifically disposed of will pass to the Respondent.  
ow it seems to me utterly impossible that the word  
said" in the limitation over to *William Hall Warren*  
n refer to "all my real and personal estate of whatever  
nd" given to the trustees, for it is not generally "all  
y said property," but "all my said property so given  
said Maternal Retreat." The *Vice Chancellor*, think-  
g that he can put a meaning on the word "so" con-



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sistent with his construction, seems to allow that the word "said" must be struck out of the will; but although it is only a monosyllable, I confess that in my opinion, this proposal can as little be carried into effect, as the proposal to annihilate "space and time." There are no other words of gift to *William Hall Warren* except of the house No. 4, *Douglas Place, Bayswater*, the express limitation of which to him in fee, should there be no trustees elected, would have been unnecessary, if the previous residuary limitation could have the proposed meaning ascribed to it.

It is argued that the testator did not mean to die intestate as to any part of his property, and that he shows a "general intent" that not only the two houses specifically given to *William Hall Warren*, but that all the property given for the benefit of the charity, failing the charity, should go to *William Hall Warren*. Even if there were not other words in the will not quite in harmony with this supposed "general intent," I think that to give the proposed effect to it would be at variance with the rule, that "the heir at law is not to be disinherited unless by express words or necessary implication"; that is to say, by a will clearly indicating the intention of the testator to leave his property to some one else. If there are words in a will which raise a doubt as to the amount of interest given to a devisee or legatee, the Court must put a construction upon them and give effect to them, unless they are wholly insensible; but where there is uncertainty whether the property has been devised or bequeathed away from the heir-at-law or next of kin, the wise course has been, to let the property go as the law directs in cases of intestacy.

On the second question raised by this appeal, "whether *William Hall Warren*, under the construction given in



ur, takes the absolute interest in the two houses  
l, on failure of the prior limitation in favour of  
ity," I entirely agree with the *Vice Chancellor*;  
ler that the charity did not take effect, because  
ise of the houses for the foundation of a lying-in  
was void by the Statute of Mortmain. The  
had never heard of this statute, and he was not  
of any obstacle that could prevent the hospital,  
was to perpetuate his name, being established,  
the inhabitants of the parish not appointing a  
tee, and not being willing to carry out the scheme.  
s clear that if the hospital was not established, he  
d that the two houses should belong to his godson,  
*Hall Warren*.

as gravely argued at your Lordships' Bar, that  
tator wished the opinion of the inhabitants of  
ter to be taken on the expediency of establishing  
pital, and that a resolution of the parish in the  
e was the condition on which *William Hall Warren*  
take the two houses. But I apprehend that the  
of the foundation of the hospital was the contin-  
n which he intended his godson to take, whatever  
e the cause of that failure; and that the charity  
failed, the godson was entitled as if the prior  
on had been for life to a person who had pre-  
d the testator. If it can be supposed that the  
meant the limitation over to take effect, only in  
nt of the preceding limitation failing in one par-  
way, this may be considered to be strictly a con-  
and unless the condition is fulfilled the limitation  
ls; but it is quite clear that the testator here  
a conditional limitation over on the failure of the  
nitation, howsoever that failure might happen.  
leading case on this subject your Lordships are

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well aware is *Curius v. Coponius*, reported by Cicero (*k*), which was followed by *Jones v. Westcomb*, before Lord Harcourt, and I hope that the doctrine established by it is not to be considered as overturned by any recent decision. In both these cases the testator, believing his wife to be *enceinte*, devised his estate to the child *en ventre sa mère*, and if such child should die under age, then over. The wife was not with child, and the question was, whether the devisee over should take. Held to be a conditional limitation on there being no child of the father by his wife that should reach majority. There was no such child, and therefore the devisee over was entitled.

In the present case the prior limitation became abortive by the Statute of Mortmain, and the limitation over takes effect.

I do not think it necessary to travel through the long list of cases of this class which are collected by Mr. Jarman in his valuable Treatise on Wills (Vol. 2, p. 667 *et seq.*), from which the same doctrine may be deduced, or to examine the two cases of the *Attorney General v. Hodgson* (*l*), before the Vice Chancellor of England, and *Philpott v. St. George's Hospital*, before the present Master of the Rolls (*m*), which rather startled the Vice Chancellor in this case. With great deference I think it enough to say that these two cases are rather to be distinguished from the cases to which I have referred, or that they are not to be considered binding authorities.

I must, therefore, advise your Lordships to affirm the decree appealed against, as to the two houses specifically devised to the Respondent; but, in favour of the heir-at-law, to reverse the decree as to the rest of the property.

(*k*) Referred to at length by Vice Chancellor Wood, 4 Kay & Johns. 603. See also Wing v. Angrave, 8 H. L. Cas. 183. 200.  
 (*l*) 15 Sim. 146.  
 (*m*) 21 Beav. 134.



Lord *Cranworth* :

My Lords, in this case it might, perhaps, be sufficient for me to say shortly, that I concur in the result at which my noble and learned friend on the woolsack has arrived. In putting a construction on the wills of illiterate persons, securely penned, it can rarely happen that the decision will serve as a guide to others in the discharge of similar duties afterwards, and, therefore, in deciding such questions in a Court of Appeal, the main reason, or one of the main reasons, for doing more than simply affirming or reversing the decree brought under review is wanting. But it would hardly be respectful to the very eminent Judge, from whom, in this case, I differ, or satisfactory to the Respondent, whose interests are materially affected, if I did not shortly state the grounds on which the opinion I have formed rests.

With respect indeed to the two houses, I concur with the *Vice Chancellor* in thinking that the right of the Respondent is clear. In support of his title it is not necessary that he should rely on the principles established in the cases of *Jones v. Westcomb* (n) and *Avelyn v. Lord* (o), for in the present case, the contingency on which these houses are given to the Respondent has actually occurred in the very terms in which it is indicated by the testator. The inhabitants have not appointed a committee, and there are no trustees of the projected scheme. It is immaterial to consider why there has been no committee, or why there have been no trustees. The contingency on which the houses are given to the Respondent has actually happened, though it may be not the reason which he contemplated. If the inhabitants

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n) *Prea.* in Chan. 316 ; 1 *Eq. Cas. Abr.* 245.

o) 1 *Ves.* 420.



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WARREN. had met and appointed a committee and trustees, and the charity had failed merely because the gift was void under Lord *Hardwicke's* Act, then would have arisen the question, whether the principle of the cases I have referred to did not govern the present case; I incline to think it would; but no such question can arise where, as in this case, the exact contingency indicated by the testator has happened. As to these houses, therefore, I think the decree below was correct.

But as to the rest, which constitutes the great bulk of the testator's property, I cannot assent to the views of the *Vice Chancellor*. His Honor was of opinion, that where the testator, in the event of the inhabitants not appointing a committee, willed that all his said property so given to the Maternal Retreat should absolutely belong to the Respondent, he might be considered to have intended not only the house, No. 71, which he had expressly given for the Maternal Retreat, but also the general residue of all his real estate. I cannot adopt such a construction of the testator's language. I cannot discover anything, either in the part of the will which precedes the gift of the house, No. 71, to the Respondent, and which has been cited at length by my noble and learned friend, or in what follows that gift, showing that the testator intended to give anything besides the house. The expression "All my said property so given to the Maternal Asylum," certainly, according to its natural construction, points only to the house. He had, it is true, previously, by a general devise, given all his real and personal estate to his executors, and if the gift to the Respondent had been of "all my said property," it might, perhaps have been successfully contended that those words must be referred not to the immediate antecedent, *i. e.*, the house, No. 71 only, but to the beneficial interest in all his real



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not otherwise disposed of. But the words follow-  
 words "all my said property," namely the words  
 en to the said Maternal Retreat," define exactly  
 as to be the extent of his bounty, and limit the  
 ty of the expression "all my said property,"  
 e *Chancellor* understood the words "*so given*" as  
 , given by my will in the same manner as the  
 No. 71, was given, *i.e.*, given to the asylum on  
 n of the inhabitants appointing a committee and  
 . And he therefore considered that the gift  
 e taken to comprise the numerous other houses,  
 the subsequent parts of the will, to the asylum,  
 ; expiration of previous life estates in them given  
 ent relations or friends named in the will.  
 ords, I think if we were to adopt this construc-  
 should be acting in contravention of the well  
 rule that the heir at law is not to be disinherited  
 where the property of his ancestor has been  
 and unambiguously given away from him.  
 lonor considered it plain that the testator did not  
 to die intestate as to the bulk of his property.  
 y he did not; most persons when they make a  
 and to dispose of all they possess. But it is not  
 to be satisfied that intestacy was not intended.  
 be shown distinctly that some person has been  
 the place of the heir. The title of the heir does  
 and on probable intention; and here I seek in  
 : any words showing that the Respondent has  
 , the language used, substituted for the heir.  
 s argued at the Bar that the language of the will  
 is a clear intention to give to the Respondent all  
 duary estate not taken by the charity, and that  
 uch an intention appears, particular expressions  
 moulded so as to carry it into effect. But this



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is begging the whole question. There is nothing to indicate such general intention except the very words we are called upon to interpret.

The circumstance that the will sometimes describes those who were to take after specific life estates as "trustee or trustees," and sometimes as "trustees," sometimes as "residuary legatee or legatees," and sometimes as "residuary legatee," does not, I confess, influence my judgment at all. I am not sure that it would have done so even in the well-drawn will of an educated man, but in such a will as that now before us, it appears to me to be entitled to no weight whatever.

The result at which I have arrived is the same as that already indicated by my noble and learned friend. I think that the decree is right as to the two houses, 71, *Queen's Road*, and 4, *Douglas Place*, and wrong as to the rest of the property.

Lord *Wensleydale*:

My Lords, two questions arise on this appeal to your Lordships from the decree of Vice Chancellor *Wood*.

The first, whether his Honor was right in holding that the residue of the real and personal estate of the testator, was by his will, devised to the Respondent *William Hall Warren*, his godson; and, secondly, whether the previous condition, on which part of the property was given to him, had happened, according to the true intent of the will.

On the first of these questions, I believe there is no difference of opinion among your Lordships. I entirely concur in the advice given by my two noble and learned friends, who have just addressed your Lordships, to reverse in that respect the decree of the *Vice Chancellor*, who felt, as he says, greater difficulty in deciding on the



ion of this ill-drawn and confused will, than he  
n almost any other case that he had hitherto had

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o doubt very obscure, but the established rule is  
common law takes its course, both with respect  
scent of real and personal estate, and that the  
w and next of kin respectively take, unless the  
is left by express words or necessary implication  
r person, and that the burden of proof lies upon  
on. That rule being kept in view, I do not feel  
culty in deciding the present case; and upon  
considering all the parts of the will, I cannot  
ray to a conclusion that there is in it any clear  
nore than certain defined portions of the real  
the Respondent. There is a gift of all the real  
onal property to certain persons to be the testa-  
ctors; then a gift of the freehold house, No. 71,  
*Road, Bayswater*, in the first instance to the in-  
s of *Bayswater* to found a Lying-in Asylum, and  
vent of that gift failing, then "all my property  
*to the Lying-in Asylum*," is absolutely to belong to  
on *William Hall Warren*, the Respondent. Here  
y a gift over of the house, No. 71, to him; but it  
om clear that the meaning of the words used was  
more. It is possible, perhaps indeed, probable,  
testator may have intended to give more, but he  
said so, and we have only to construe what he  
tten. The gift over is limited to the "property  
to the asylum," and certainly nothing is so given  
the house, No. 71.

n, the freehold house, No. 4, *Douglas Place*,  
*uter*, is given by clear words to the Respondent,  
n *Hall Warren*, for life; after his death to the  
s of the asylum, and if there should be no such



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trustees, then to him absolutely. So that he is clearly entitled to a life estate, and to the fee on a contingency. Whether that contingency has happened will be to be considered.

In the third place, the leasehold house, No. 6, *Pickering Place*, is clearly given to the Respondent, *William Hall Warren*, for life, but after his death it is to go for charitable purposes, and that bequest over is void.

As to all the other property of the testator, it appears to me that there is no clear intention expressed, or to be necessarily implied, to give it to any one who can take it, and therefore the rule of law must prevail that the rest of the real estate must descend to the heir-at-law, and the personal estate must go to the next of kin.

Upon the second question whether upon the true construction of the will the devise over of the freehold house No. 71, to the Respondent, and the remainder in fee of the freehold house No. 4, *Douglas Place*, have taken effect, I have felt, and still feel, very considerable doubt. The question, I take it, depends upon the construction of the conditional clause. If that clearly requires a particular event to occur upon which the devise over is to take effect, you cannot substitute another event. If there is a bequest to one on a particular event happening, and, failing that event, to another, the latter could not take unless that very particular event happened.

Thus in the much considered case of *Wing v. Angrave* (*p*), where there was a bequest by a wife, under a power of appointment, to her husband, and if *he died in her lifetime* then over, it was held by this House that unless it could be shown that the husband died in *the lifetime* of the wife the devisee over did not take; that the precise event



must be proved to have happened, and that the words could not be construed to mean, if the previous legacy should lapse, however strongly one might conjecture that the testatrix could not have intended to make the gift over depend upon the lapse in that particular way, but to provide for every case of lapse by death.

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The doubt in this case is whether the testator has not imposed as a condition that the executors should call together the inhabitants (the legal construction of that term probably is occupiers paying scot and lot), and upon that call, if they will accept the bequest, they should appoint a committee, and carry out the scheme, and then that the estate shall go to the trustees of the charity; but if not, in that case, and in that only, the devise over to the Respondent should take effect; and I feel considerable difficulty in overruling or distinguishing the cases of *Attorney General v. Hodgson*, before the *Vice Chancellor of England*, and *Philpott v. St. George's Hospital*, before the *Master of the Rolls*.

But on the other hand it may be said that as the estate is left to the charity in the first instance, the direction to call a meeting was not an essential part of the will, and as the inhabitants have never appointed a committee, or taken steps to carry into effect the bequest, it has failed altogether, and the devisee over is entitled; and it may be said, too, that as the devise over is only postponed in favour of a devise which is nugatory in its very inception, the will should be read as if that clause was not in it at all.

Upon these grounds, and knowing the opinion of my noble and learned friends, I do not think I ought to dissent from their advice in the construction of this part of the will.



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Lord *Kingsdown* :

My Lords, I agree in this case on both points with my noble and learned friends.

On the first point it is unnecessary to add anything to what has been said.

As to the second point, it appears to me to be extremely difficult to reconcile the case of *The Attorney-General v. Hodgson* (*q*) with the principles of former decisions or with the common understanding of mankind. The testator gave money for a charity, which the law would not permit to take effect, and directed that "if no such institution could be conveniently established" the money should be applied to other charitable purposes not open to objection. The first charity could not be established at all, conveniently or inconveniently. The condition, to use the words of Sir *William Grant* in *Murray v. Jones* (*r*), if there was a condition, was more than performed. The testator did not say, nor could he intend, that the gift over should take effect only in the event of the first gift being good in point of law, but also in the event of its being held to be subject to inconvenience in its execution.

The case upon this point does not seem to have been much argued, and probably the report is not quite accurate. The *Vice Chancellor*, after reading the words of the first gift, is made to say, "By those words he means that if there is any reason why his first purpose cannot be effected then his second purpose shall be effected." This passage would seem to be conclusive in favour of the establishment of the second gift.

The case of *Philpott v. St. George's Hospital* (*s*), was

(*q*) 15 Sim. 146.      (*r*) 2 Ves. & B. 313.      (*s*) 21 Beav. 134.



ounded on the decision in *The Attorney General v. Hodgson*. There was more to be said in favour of the decree in the former case than in the latter, because the particular events on which the gift over was to take effect were more distinctly specified. But I agree with the *Vice Chancellor* in the opinion which he has expressed in his judgment in the present case, that the authority of those cases cannot be maintained consistently with the principles of former decisions.

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In those cases, however, the particular condition on which the gift over was to take effect had not happened. Here it actually has happened. The first gift is to go over "in the event of the said inhabitants not appointing a committee, or not willing to carry out the said scheme." No committee has been appointed. Is it any answer to say, True; but if a committee had been appointed, it could have been nugatory, for the law would not have admitted any resolutions of that committee in favour of the charity to take effect.

The other gift is to take effect if there be no trustees of the intended charity. There are not, and by law cannot be, any trustees. The gift over seems to me to have taken effect, whether we regard the precise language of the particular clause, or the general intention of the testator.

Decree appealed against varied; and cause remitted. Assets to come out of the estate.

Lords' Journals, 30 April 1861.

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 May 2, 3, 6,  
 17.  
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*Infant.*  
*Guardian.*  
*Court of*  
*Chancery.*  
*Ward.*  
*Court of*  
*Session.*  
*Jurisdiction.*  
 48 G. 3, c. 151.  
*Costs.*

Lieut. Colonel JAMES FREDERICK DUDLEY }  
 CRICHTON STUART - - - - } *Appellant.*

The Most Honourable JOHN PATRICK }  
 CRICHTON STUART, Marquis of Bute, } *Respondent.*  
 and Earl of Dumfries, an infant - - }  
 (in the English Appeal).

and

Major General CHARLES STUART - - - *Appellant.*  
 Lady ELIZABETH MOORE ; Lieut. Colonel }  
 JAMES F. D. C. STUART - - - - } *Respondents.*  
 (in the Scotch Appeals).

An order in Chancery, on petition, constituting a guardian of an infant, makes that infant a ward of Court.

In cases relating to the care of infants, the benefit of the infant is the foundation of the jurisdiction, and the test of its proper exercise. On this subject there ought to be a perfect reciprocity of action between the courts of *England* and *Scotland*, although, as to judicial jurisdiction, the two countries are to each other independent foreign countries.

The *Lord Chancellor*, though "*Chancellor of Great Britain*," has only certain statutory powers in *Scotland*, which are not of a judicial nature.

The 48 *Geo.* 3, c. 151, s. 15, applies to judgments and orders in regular suits, and not to orders made with respect to the custody of infants. The latter kind of orders may be made either on a bill, or petition.

*Semble*, that every order respecting the custody of an infant, whether granting or refusing the petition as to its custody, is to be treated as a final judgment, and therefore subject to appeal.

*A.* was the son of a person who was at once a Peer of the *United Kingdom*, and a Peer of *Scotland*. *A.* was born in *September* 1847. *A.*'s father had estates in both countries, and resided at intervals in both. He died in *England*, in *March* 1848. *A.*'s mother was, in *May* 1848, appointed by the Court of Chancery his guardian, and *A.*'s uncle (the heir presumptive to the title) was appointed Tutor at Law in *Scotland*. This appointment gave him no right to the custody of the infant's person, but only conferred on him the management of the property till the infant should become 14 years



's mother died in *Scotland*, in *December* 1859. By the will  
 other, *S.* and *M.* were appointed guardians, and that  
 nt was confirmed by the Vice Chancellor, by whom  
 for the infant's education was prepared and approved of.  
 en in *Scotland*, under the personal care of *M.* She pro-  
 rring him to *England* to be educated, as *S.* proposed, in  
 with the scheme of the Court of Chancery. She  
 him to *London*, but in consequence of disagreements  
 herself and *S.*, suddenly carried him back to *Scotland*.  
 gs in the Court of Session were instituted, to compel her  
 the custody of the infant to *S.* ; but though the Court  
 ery had, on the application of *S.*, directed that he should  
 t back to *England* to be educated, the Court of Session  
 ed an interlocutor, postponing the case for nearly four  
 nd afterwards two other interlocutors interdicting any-  
 tever from taking the infant, "a domiciled *Scotch* sub-  
 of the jurisdiction of the Court of Session :

these interlocutors were erroneous ; that the jurisdiction  
 urt of Chancery over the infant had been established at a  
 ; that his mother, having afterwards changed his domicile  
 id not affect the matter ; that under such circumstances  
 ion of conflicting jurisdiction between the two courts  
 se, but that both, representing the Sovereign as the  
*triæ*, were bound to assist each other in doing what was  
 to ensure the benefit of the infant, which in cases of this  
 the primary consideration dominating all others.

*Beattie*, 10 *Clark & Fin.* 42, explained.  
 ere ordered to come out of the estate.

these cases were called on, the House directed  
 wo Appeals should be heard together, but that  
 sel for the Appellant in the *Scotch* Appeal  
 gin. There was a question of competency,  
 had been proposed to discuss in a preliminary  
 their Lordships directed that it should be con-  
 ong with the merits of the case.

te Marquis of *Bute* was both a *British* (Mar-  
*ute*) and a *Scotch* peer (Earl of *Dumfries*). He  
 es in both countries ; his *Scotch* estates produced

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a rental of 17,000 *l.* a year; the rental of his *English* estates amounted to 76,000 *l.* a year. He had many houses in both countries, and resided at different times in both. His son, the present Marquis, was born in *Scotland*, on the 20th *September* 1847. The late Marquis died at his *English* seat, *Cardiff Castle*, on the 10th *March* 1848. Both the mother and the child were at that time resident with the father at *Cardiff Castle*. The father had by his will appointed his younger brother, Lord *James Stuart*, Mr. *O. T. Bruce*, and Mr. *Macnab* his executors; but the will said nothing about the guardianship of the child. On the 3d *May* 1848 a petition in the name of the infant Marquis was presented to the Court of Chancery, praying for the appointment of a guardian, and that the mother might be appointed. An order was made thereon by Vice Chancellor *R. Bruce* on the 10th *May* 1848, appointing the mother to be the guardian; both the mother and child being at that time resident in *England*. The mother afterwards returned to *Scotland*, and died at *Mount Stuart*, in the *Isle of Bute*, on the 28th *December* 1859. By her will, she said, in the event of my dying before my son attains the age of 21 years, I recommend and trust that the Court of Chancery will appoint as his guardians Colonel *Charles Stuart* (now Major-General *Stuart*, the Appellant in the *Scotch* appeal), “late of the 13th Light Infantry, Sir *Frederic Hastings Gilbert*, baronet, and Lady *Elizabeth Moore* (a relative of the Marchioness of *Bute*, and now one of the Respondents in the *Scotch* Appeal), “whose near relationship entitles them to the office, and in whom I have the most perfect confidence.” Sir *F. Gilbert*, was then in *Scotland*, and has since continued abroad in the diplomatic service, and never interfered in the business. An application was duly made to the Court of Chancery by Major-General



*Stuart* and *Lady Elizabeth Moore* (the latter described as of *Dover Street, Piccadilly*) and by an order of 7th *February* 1860 they were duly appointed guardians of the infant Marquis. He and *Lady Elizabeth Moore*, were at that moment in *Scotland*. Shortly after the making of this order Major-General *Stuart* went to *Bute* to fetch the young Marquis to *England*, but *Lady Moore* earnestly begged not to be then deprived of him, and promised within a few days to bring him to *England*. Major-General *Stuart* accordingly returned without him. On the 9th of *March* 1860, *Lady Elizabeth* arrived at *Edinburgh*, on her journey to *England*. Letters frequently passed at this time between *Lady Elizabeth* and Major-General *Stuart*, in which she admitted the existing deficiencies of the young Marquis's education, and spoke of her intention, that he should soon be at *Hubborne*, the residence of Major-General *Stuart*; she finally fixed *Wednesday*, 28th *March*, as the day of her intended arrival. She did not arrive, but on the 3d *April* the Major-General received from *Lady Elizabeth* a letter, dated 2d *April*, in which she said, "Much has passed in my mind on the subject of your plans with respect to *Bute*. I find that he contemplates leaving me with alarm, and is so unhappy about it, that I cannot but feel it is a step which ought not to be directly taken without any actual necessity. I think that *Bute* himself ought to be consulted before we decide on what is so material to his future prospects. I therefore feel the absolute necessity of my entirely giving up my intended visit to *Hubborne*." Major-General *Stuart* wrote an answer, in which he suggested an intention of applying to the *Vice Chancellor*; and *Lady Elizabeth* replied in a letter, in which she said, "I agree with you, that unless we could reconcile our

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served on *Lady Elizabeth*, at an hotel in the neighbourhood of *Edinburgh*, where she and the Marquis were then residing. *Lady Elizabeth* refused obedience.

Lord *James Stuart*, the brother of the late Marquis, had been on 30th *May* 1848, by letters tutor, in due form constituted the tutor at law of the infant, in *Scotland*; and as such, had the administration of the real and personal property of the infant in *Scotland* “*Usque ad ejus legitimam ætatem*,” which by the law of *Scotland* is 14 years (a). On the death of Lord *James Stuart*, his son, Lieut. Colonel *Stuart*, was, in *November* 1859, appointed tutor at law.

On the 18th *July* 1860 a petition was presented to the Court of Session by Major General *Stuart*, praying that *Lady Elizabeth Moore* might be ordered to deliver up to him the custody of the infant, in conformity with the order of the Court of Chancery. *Lady Elizabeth* appeared upon this petition, which was argued in the Court of Session. That court raised several difficulties as to the proceedings in Chancery being sufficiently authenticated by the documents produced from the Chancery offices; and when it appeared that the tutor at law in *Scotland* was a consenting party to the proceedings of Major General *Stuart*, the court declared that he was acting improperly in consenting to what was in substance an application to allow the Marquis to be sent out of *Scotland*; and that gentleman thereupon thought himself bound to adopt the suggestion of the court, and he became an opposing party. His opposition was formally recorded on the minutes. The court then, on the 20th *July* 1860, made an order appointing *Lady Elizabeth* to answer the petition, and directing service of the petition upon the tutor at law, and also separately on the pupil,

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(a) See post, 450 n. (e). The Marquis would be 14 years of age in September 1861.



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with a view to his being heard in the matter through a *tutor ad litem* ; and the case was then adjourned to the 13th *November* 1860. In the month of *October* 1860, Lady *Elizabeth* dismissed the acting tutor of the young Marquis, and leaving Dumfries House, where (at the desire of the tutor at law) they were then residing, took the infant to *Rothsay*, in the *Isle of Bute* ; but, instead of proceeding to the family mansion there, put up at an inn. Colonel *Stuart*, the tutor at law, thereupon, having first secured the consent of the Earl of *Galloway*, presented a petition to the Court of Session, praying that the infant might be delivered over to his custody, to be sent to a private school with the son of the Earl of *Galloway*, and that an interim injunction might issue to prevent Lady *Elizabeth* from interfering with or obstructing him in the discharge of his duties as tutor at law. This interim injunction issued, and the case was reported for the consideration of the Lords of the second division of the Court of Session. General *Stuart* appeared on this petition, and stated that he did not oppose the sending of the infant to a private school till the case should be heard and disposed of on the merits. The tutor at law alleged, that, with reference to his rights as such, he withheld, until some arrangement should be made as to the exercise of those rights, his assent to the removal of the infant to *England*. On the 20th *November* the original petition of General *Stuart* came on for hearing in the Court of Session, and an order was made for taking evidence, and a commissioner was appointed for that purpose. No fact was in dispute, except the technical proof, as to which the Court of Session was unsatisfied, of the proceedings in the Court of Chancery. On the commissioner arriving in *England*, Vice Chancellor *Stuart* refused to make any order for the *Registrar* to appear



the commissioner, but made an order requiring Major General *Stuart* (the tutor at law) to desist from his proceedings in the Court of Session, but allowed him to make any application to the Court of Chancery he might think proper as to the custody of the Marquis, or as to the mode of enforcing the order of the 6th *July*. In the meantime, the Marquis was, by authority of the Court of Session, removed from the custody of Lady *Elizabeth*, and permitted to be under the care of the Earl of *May*, with whom he was then residing, and to be sent to the school of *Louth*, near *Musselburgh*, under the direction of *Thomas Langhorne*; and all persons whatever were prohibited from interfering with the arrangement, and the Earl was prohibited from allowing the Marquis to go out of the jurisdiction of the Court of Session.

On the 4th *February* 1861, the tutor at law presented a petition to the Court of Session, praying it to give such directions as to the court might seem fit, as to the place and education of the pupil, and as to the proceedings in the Court of Chancery regarding the proposed removal of the pupil to *England*.

On the 6th *February*, Lady *Elizabeth Moore* presented to the Court of Session a note, stating that by the death of her relation she, Lady *Elizabeth*, had become the Marquis's nearest cognate on the mother's side in *Scotland*, and praying that the proceedings in Chancery, which she declared had been instituted without knowledge or authority of the Marquis, should be brought under the notice of the Court of Session, in order that the interests of the infant Marquis might not be prejudiced by proceedings taken elsewhere in England." Major General *Stuart* was then in *England*. The Court of Session on the next day, 7 *February*, pronounced an interlocutor which, reciting, among

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other things, that “Major General *Stuart* had made no appearance,” interdicted Lieut. Colonel *Stuart* and the Earl of *Galloway* from removing the Marquis beyond the jurisdiction of the court, or to interfere in any way with his custody, residence, and education, as settled by the orders of the court; and interdicted Major General *Stuart* from doing anything to remove him out of the jurisdiction, or to interfere in any way to prevent the previous arrangement from being carried into full execution (*a*).

The cause was again brought before Vice Chancellor *Stuart*, who on the 9th *February* 1861 pronounced another (*b*) order restraining the tutor at law from taking any farther proceedings in the Court of Session, except with the leave of the Court of Chancery.

Major General *Stuart* appealed against these several interlocutors of the Court of Session. Lady *Elizabeth Moore* supported them, and appeared in opposition to the *English* decrees.

Colonel *Stuart* appeared (in virtue of his office as *Scotch* tutor at law) as an Appellant against the last order of the Court of Chancery, chiefly on the ground that no order of the Court of Chancery would exonerate him in *Scotland* from the consequences of any breach of what the Court of Session regarded as his legal duty.

The Attorney General (Sir *R. Bethell*), and Sir *H. Cairns* (Mr. *Macqueen* was with them) for the Appellant, Major General *Stuart*:

The Court of Session has improperly interfered with the course of proceedings in the Court of Chancery; it has raised a question of jurisdiction, and framed its inter

(*a*) Cases in the Court of Session (2 Series), vol. 23, p. 446.

(*b*) 2 Giff. 582.



ors with reference to that question, when no other deration but that of the infant's interest ought to guided its decision. The Court of Session has un- nately adopted what it thought to be the decision *hnston v. Beattie* (c) but has mistaken that decision. court has thought that, according to that decision, child comes into this country from *Scotland* for any orary purpose, it may be made a ward of Chancery, detained here against the will of the *Scotch* lian and the authority of the Court of Session, as applied, under opposite circumstances in *Scot-* what it deemed that case to have decided. The ence between the two cases is this: here the *English* lians were clothed with the authority of the Court ancery, in which proceedings were begun so early 48, while there, the *Scottish* tutors and curators had become so by virtue of a private deed, and not under ppointment of the *Scotch* court. Without, there- assailing the authority of that case, it was clear that not furnish a precedent for the interlocutor here; as which, as the jurisdiction of both courts in a r like this is derived from the paternal power of the sovereign, it was the duty of the one to render possible assistance to the other in recognition of uthority already possessed by it through its exercise : Royal prerogative. Had the power of the Crown is case been first exercised in *Scotland*, the effect l have been to give to the courts there the jurisdiction he infant. The *Lord Chancellor*, though *Chancellor* eat *Britain*, has no judicial authority in *Scotland*. here the jurisdiction of the Court of Chancery was established in the case of this infant before any pro- gs whatever were taken in *Scotland*.

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(c) 10 Clark & Fin. 42.



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power to dispose of its fortune and person, to contracts to marry, and to select its own domicile *on Personal Relations* (e). For the infant's and benefit, therefore, he ought to be placed care of Major-General *Stuart*, his proper guardian will see to carrying into effect the scheme approved of by the Court of Chancery. *Dawson and Hope v. Hope* (g), which will be relied

(d) Bk. 1, tit. 7. s. 1.

(e) 1 Fraser, Part 2, c. I. and Part 2, c. III. s. 1. puberes have the same powers as persons of full age."

"When a child arrives at puberty, he is by the law entirely free to dispose of his person independently of his natural or civil. He may marry or fix his domicile, or do what he may please, and no guardian and no court of law can prevent him from going abroad or staying in this country, however he may be the opposite course from that he proposes to follow. A case, who was only 12 years and five days old, and therefore a *pubes*, was put by her guardians at a boarding-school in her mother having married, a second time, a gentleman. The daughter addressed a letter to her guardians, informing her resolution to accompany her mother, and not to go to the boarding-school; adding, that by law she was now become her own person. A majority of the guardians, alarmed at this, presented a bill of suspension to the court, praying for an interdict against the daughter going abroad, and against her mother or other person carrying her out of the jurisdiction of the court. The case was argued on written pleadings, and the court granted the interdict. It was observed on the bench that "the law has not conferred on curators that controlling power over the person of minors which is here claimed and the *veritas officium* of



ther side, have no real application to a case like the present.

Mr. *R. Palmer*, Mr. *Patton* (of the *Scotch* bar), and Mr. *Arthur Hobhouse* were with him, stated for Lieut.-Colonel *Stuart*, that he was willing to follow any direction the court might give for the benefit of the infant, only desiring that he might not be put in a position to appear and commit a contempt of the Court of Session. They submitted, on the authority of *Logan v. Fairlee* (*h*), that, even according to *English* principles, some one within the jurisdiction ought to be appointed guardian; and they suggested that the Earl of *Galloway*, who was resident within the *Scotch* jurisdiction, ought to have that office. That was the principle on which it must be considered that *Johnstone v. Beattie* proceeded. In *Dawson v. Jay*, the court knew how the child had been brought to *England*, but that did not prevent the court from exercising its undoubted powers to keep it here when it was once in this country. If Lady *Bute*, the mother, was appointed by the Court of Chancery, guardian in *May* 1848, and *James Stuart* was, in the same month and year, appointed by the Court of Session tutor; and Lieut.-Colonel *Stuart*, the present Respondent, succeeded as his son and heir to all his rights. The question of precedence at that point of time was therefore immaterial. [The *Lord Chancellor*: If there is anything in the dates of the transaction, he was first made a ward of Chancery, directly after his father's death.] There was here no sufficient *English* domicile to justify the interference of the Court of Chancery. The case of *Pottinger v. Wightman* (*i*) shewed that the mother had power to change the domicile of the infant, and here that had been done by Lady *Bute* before her

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(*h*) Jacob, 193.

(*i*) 3 Mer. 67.



was not the payment of money into court that gave jurisdiction, but only afforded the means of exercising it)]. The same rule existed in *Scotland*. In *Erskine's Principles of the Law of Scotland* (n) it is said, "If a minor chooses to be under the direction of curators, he must raise and execute a summons citing at least two of the next of kin to appear before his own judge ordinary, &c.," which shows that a formal proceeding is necessary. It does not appear here that the Marquis was regularly made a ward of Chancery.

The authority for what has been done in the Court of Session in this case is the decision of this House in *Johnstone v. Beattie* (o). But even if that case is deemed to have gone too far, or to be inapplicable, that of *Morrison v. Jay* is not impeached. There the removal of the infant, already subject to guardianship, created by the American courts, took place in the face of a promise to the contrary, and the removal was to a country in which the infant had no property, yet it was sustained by the courts here, and the infant was stayed in this country, and not allowed to be taken back to *America*. *Johnstone v. Beattie*, though differences of opinion did exist in it, proceeded on principles previously recognised in *Ex parte Watkins* (p), and afterwards in *Dawson v. Jay*. *Morrison v. The Earl of Sunderland* (q) shews that the powers of the *English* and the *Scotch* courts may co-exist, and that if the person is within the jurisdiction of either, that court may lawfully deal with him without being subject to the interference of the other.

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m) See the cases collected 1 Madd. Ch. Pr. (Tit. Infants), p. 337, in which it appears that the jurisdiction was exercised on *petition* where there was no property, or only very little; but where it was considerable, a bill was required to be filed.

n) Bk. 1, tit. 7, s. 6.

(q) Morr. Dicty. 4595. Craigie & Stewart 454.

o) 10 Clark & Fin. 42.

p) 2 Ves. 470.



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There was no sufficient proof in *Scotland* of the  
 ticity of the orders said to have been made in the  
 of Chancery, and the case just cited shews that  
 necessary.

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The *Attorney General* replied.

17 May.

Lord Chancellor (Lord *Campbell*):

My Lords, I think that this case mainly depends  
 the propriety or impropriety of the interlocutor  
 Second Division of the Court of Session, dated  
*July* 1860, refusing then to interfere respecting the  
 custody of the person of the infant Marquis of *Bute*  
 adjourning the farther consideration of the subject  
 four months, till the 20th of *November* following.

In examining this question, I beg to begin by observing  
 that, as to judicial jurisdiction, *Scotland* and *England*  
 although politically under the same Crown and  
 the supreme sway of one united Legislature, are  
 considered as independent foreign countries, unconnected  
 with each other. This case is of a judicial nature, and  
 not between parties who are plaintiffs and defendants,  
 and it is to be treated as if it had occurred in the  
 of Queen *Elizabeth*.

The third reason of the Appellant is, "Because  
 in this case the Great Seal had authority in *Scotland*, the  
 custody of the infant Marquis involving public con-  
 siderations." The holder of the Great Seal of the  
*Kingdom* is Lord Chancellor of Great Britain, and  
 by statute he has important functions to exercise in *Scot-*  
*land*—such as the appointment and dismissal of magistrates  
 and sealing writs for the election of *Scotch* Peers, and  
 Members of the House of Commons for *Scotland*;  
 as a judge, his jurisdiction is clearly limited to the  
 of *England*. Although Cardinal *Wolsey* was impeached  
 for having, while Lord Chancellor of *England*, caused



the Great Seal to *Calais*, I conceive that the holder of the Great Seal may now lawfully carry it into *Scotland*, and there use it for sealing *Scottish* or Imperial documents which ought to pass under the Great Seal of the *United Kingdom*. Nevertheless, as judge, he has no jurisdiction in *Scotland* whatever. In this respect there is entire equality and reciprocity between the two divisions of this island, and a decree of the Court of Chancery is not entitled to more respect in *Scotland* than an interlocutor of the Court of Session in England.

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Nor as far as jurisdiction is concerned, does it make the slightest difference that the ward for whose custody this dispute has arisen is a Peer; and we care not whether he be denominated a Peer of *Scotland* or of *Great Britain*, or whether he be a Peer or a peasant.

I must likewise observe that our view of the question of jurisdiction will not be influenced by any comparison between the merits of the law of *Scotland* and of the law of *England* respecting minors. If I deem it inexpedient that a boy should become his own master at 14, with the power of managing his property, of marrying as he pleases, of making a will, and of conducting his education according to his own fancy, or entirely neglecting it, I form my opinion on the interlocutor of 20th July 1860, just as if this hazardous confidence in precocious prudence were to be attributed to the law of *England* and the law of *Scotland* in common.

But it is material that I should now state the facts and proceedings which were before the Judges of the Court of Session on the 20th July 1860, and on which it was their duty to adjudicate.

The late Marquis of *Bute*, having died at *Cardiff* in *Glamorganshire*, on the 18th of *March* 1848, without having named any guardian for his son, then an infant



On the 7th of *February* 1860, on a petition in the name of the infant Marquis, presented by “Lady *Elizabeth Moore*, next friend,” it was ordered by Vice Chancellor *Stuart*, representing the *Lord High Chancellor*, “that *James Stuart*, of *Hubborne Lodge*, in the county of *Gloucester*, and the said *Elizabeth Ann Moore*, be appointed guardians of the person of the said infant during his minority, or until the further order of this court.”

The infant having been duly constituted a ward of the Court of Chancery, and the guardian first appointed to him being dead, there can be no doubt of the authority of the Court of Chancery to appoint other guardians in her stead. General *Stuart* and Lady *Elizabeth Moore* were, *ex parentis*, the lawful custodiers of his person till he should reach 21, or the court should otherwise order.

The infant was then under the separate care of Lady *Elizabeth Moore*, the very dear friend of his mother. He had been most tenderly reared, and he gave promise of considerable intellectual capacity as well as of good dispositions; but his education had been sadly neglected. It was reckoned highly desirable that he should be sent to a public school in England.

Lady *Elizabeth Moore* always acting from kindness and disinterested motives, although afterwards most ineffectually, at first was willing to concur in this purpose, to leave the boy to the management of General *Stuart*. Having him with her at *Mountstuart House*, in the *Isle of Bute*, on the 11th of *February* 1860, she wrote General *Stuart*: “Mine is after all merely a nominal guardianship; the duties and difficulties of such an important post naturally devolve upon a man. It affords great satisfaction that my young cousin has a guardian good and wise, and experienced in the world, like General *Stuart*.”

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On the 14th of *February*, General *Stuart* wrote back to her: "Vice Chancellor *Stuart* was decidedly of opinion that *Bute* should be brought at once away from his island, and mix with other boys, &c." [His Lordship read the letter.]

The following was her most praiseworthy answer: "I am quite ready to give up the boy whenever you like to claim him. I believe the changes you contemplate making are likely to be highly advantageous to him in every respect."

General *Stuart* accordingly repaired to the *Isle of Bute* to receive the boy. Lady *Elizabeth* refused then to part with him, and entreated that he might be left with her for a short time, she undertaking to come with him herself to *London*, and there to surrender him. General *Stuart* too easily consented to this arrangement.

She actually did bring the boy to *London*. While at *Newcastle*, on her journey to the south, she wrote to General *Stuart*: "After *Monday* next I think of proposing to take *Bute* to *Hubborne* at any time that may best suit your arrangements;" and a few days after her arrival in *London* she wrote to General *Stuart*: "There are still some visits *Bute* must pay. I propose taking *Bute* to *Hubborne*, any time that is quite convenient to you, on or after *Wednesday* next." General *Stuart* wrote back, appointing *Friday, March* the 30th. A delay arose on account of the alleged indisposition of the young Marquis, although General *Stuart* had "deeply lamented the loss of several weeks to a boy so backward in his education."

A complete change had now come over the mind of Lady *Elizabeth*, and she had formed the resolution of keeping the poor ill-used boy entirely to herself and the nurse. On the 2d of *April* she wrote to General *Stuart*



in the following alarming strain : [His Lordship read the letter. *See ante*, p. 443].

In General *Stuart's* answer, on the 3d *April*, he wrote, that a boy was not a fit judge in such matters, and intimated his intention of applying to the *Vice Chancellor*.

On the 5th of *April* she wrote back that, as they differed, the *Vice Chancellor* ought to decide between them. And next day he gave her notice that he should take the necessary steps for that purpose. General *Stuart* accordingly called in professional aid, and himself saw the *Vice Chancellor* on the subject.

Lady *Elizabeth*, to favour the stratagem she had now formed, for a time gave reason to believe that she entirely concurred in this course, for on the 16th of *April* she appeared on a petition to the *Lord Chancellor*, as "next friend" of the infant, joining the name of General *Stuart* as a petitioner, and praying "that a scheme should be settled for the education and maintenance of the infant."

On the 20th of *April* an order was made for such a scheme, Lady *Elizabeth* appearing by counsel, and consenting to the order.

But in the meantime she had clandestinely, and furtively, and fraudulently removed the infant from the jurisdiction of the Court of Chancery, and was prepared to set the Court of Chancery at defiance. In the evening of the same 16th of *April* she had carried the infant with her to the railway station at *King's Cross*; notwithstanding his supposed indisposition, had conducted him by rail, under the cloud of night, from *London* across the Border between *England* and *Scotland*, and next morning had deposited him at the *Grantont Hotel* near *Edinburgh*.

A "scheme," nevertheless was proposed, and on the

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11th of *May* was regularly approved of by the *Chancellor*, directing (*inter alia*) as follows :

“ The infant Marquis, together with a tutor, reside with his guardian, the said *Charles Stuart* where the said *Charles Stuart* shall consider proper till the end of the month of *August* 1860 ; and he is to be sent to a proper private school, and on his attaining the age of 14 years he is to be sent with a private tutor to *Eton* or *Harrow*, as his guardians the said *Charles Stuart* and *Lady Elizabeth Ann Moore* may determine. Necessary and proper establishments at *Cardiff* in *South Wales*, and *Mountstuart*, in the *Island of Anglesey* are to be kept up for the occasional residence of the Marquis.”

General *Stuart* forthwith proceeded to *Edinburgh* to reclaim his ward. On the 21st of *June* a copy of the order was personally served on *Lady Elizabeth Moore* and she was required to deliver up the ward to General *Stuart* but she absolutely refused to do so.

In consequence of her misconduct, a suit was commenced in the Court of Chancery in the name of *John Harrowby* as next friend of the infant ; and on the 1st of *June* a petition was presented to the *Lord Chancellor* praying that *Lady Elizabeth Moore* might be ordered to deliver up the ward to General *Stuart*, and that she might be discharged from the guardianship. This petition was personally served upon her at *Edinburgh*, where she retained the child in her custody.

On the 6th of *July* an order was made by the *Lord Chancellor* of Chancery under the Great Seal, “ That *Lady Elizabeth Moore* should on or before the 13th day of *July* deliver up the infant Marquis to Major General *Stuart* to the intent that he might reside with him, or if he (the Major General) should consider proper, in



formity with the scheme; and it was farther ordered that Lady *Elizabeth Moore* should be discharged from being a guardian of the person of the infant Marquis; that Major General *Stuart* should be continued as such guardian, and that he should be authorised to take all necessary steps (if any) according to the law of *Scotland*, for having the Marquis delivered up to him." Next day this order was personally served on Lady *Elizabeth Moore*. General *Stuart*, still wishing to treat her with courtesy, requested an interview with her. This she positively declined. He then called at the hotel, where she kept the boy in close custody; but he could not gain access either to the one or to the other.

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Now began the judicial proceedings in *Scotland*, which have given rise to this appeal. On the 13th of *July* a petition, setting forth the facts of the case, was presented to the Court of Session by General *Stuart* and Lady *Adelaide Keith Murray*, the next cognate relation of the infant in *Scotland*; praying the court "to order the said Lady *Elizabeth Moore* forthwith to deliver up the said infant Marquis of *Bute* to the petitioner, the said *Charles Stuart*, in conformity with the said order of the Court of Chancery, and, if necessary, to grant warrant to the petitioner, the said *Charles Stuart*, or to such other person as the said Court of Session might appoint for that purpose, to remove the said Marquis of *Bute* from the custody of the said Lady *Elizabeth Moore*, and to take or deliver him into the charge of the petitioner, the said *Charles Stuart*, or to grant such other orders or warrants as to the said Court of Session should seem proper."

On the 18th, 19th, and 20th days of *July* 1860, this case came on to be solemnly heard by the Judges of the second division of the Court of Session. There has been laid before us a full account, taken by shorthand writers,



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and allowed to be accurate, of all that was said during these three days at the bar and from the bench.

I am grieved to say, my Lords, that I can by no means read this account, and the interlocutor at last pronounced, with the satisfaction and the pride generally excited in my mind when I am called upon to examine the judicial proceedings of my native country.

This was a case, if ever there was one, requiring *festinum remedium*. No fact at all material was in dispute. Indeed Lady *Elizabeth Moore*'s counsel not controverting the facts relied upon by the petitioners, boldly, in the just discharge of his duty contended, that although she had been discharged from the guardianship by the Court of Chancery, and although she had no longer any right to the custody of the ward, her custody of him ought not to be disturbed, and the ward ought not to be delivered up to the guardian from whom he had been clandestinely, and furtively, and fraudently taken, in contempt of the supreme court of a foreign country having indisputable jurisdiction to appoint the guardian.

The Judges asked for a precedent for such an order as was prayed, without suggesting that since the institution of the Court of Session there ever had been an instance of such a ravishment of ward, or of a ward so brought into *Scotland* and so reclaimed.

The Judges talked of the petitioners being disentitled to the relief claimed on account of the length of time the child had been in *Scotland*; their Lordships not considering how slowly litigation may sometimes proceed in *Scotland*, and forgetting that General *Stuart*, having made fresh pursuit after the fugitives, had done all in his power to obtain speedy redress in that country.

The Judges likewise relied much on the objection that the orders of the Court of Chancery were not sufficiently



authenticated, although their authenticity had not been seriously questioned, although a dispute about the custody of a ward is a proceeding in which technical forms not strictly observed, although reasonable evidence of the authenticity of the orders had been given, and although an offer was made to send by telegraph for the required proof, which in 24 hours might have been readily laid before the court.

Finally, knowing that Lady *Elizabeth Moore* had given her word, and betrayed her duty by her flight

from London to Edinburgh with the ward of Chancery, that it was of vital importance to the welfare of the child that he should as soon as possible be under the management of General *Stuart*, and be sent to a public school, instead of remaining under the tutelage of a nurse, the Court refused altogether to interfere with the custody of the ward; and required an answer where no fact was stated, and pronounced an interlocutor “superseding consideration of the petition till the third sederunt day in November next,” being the 20th of *November*; thus creating a delay of four months, from which most serious detriment inevitably must arise to the unfortunate ward.

The Court of Session had undoubted jurisdiction over the case. By their *nobile officium*, conferred upon them by their Sovereign as *parens patriæ*, it is their duty to take care of all infants who require their protection, whether domiciled in *Scotland* or not. But I venture to say that, what I laid down for law in this House nearly 20 years ago (q), “that the benefit of the infant which is the foundation of the jurisdiction must be the test of its exercise.” Can any human being doubt that on the 20th of *July* 1860 it would have been for the benefit of the infant Marquis of *Bute* that he should be taken

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(q) *Johnstone v. Beattie*, 10 Clark & Fin. 122.



the child, make an order for the appointment of English guardians. Allowing the jurisdiction of the Court of Chancery, I thought that it was not properly exercised for the good of the infant, and that such an exercise of it was a dangerous precedent for the appointment of guardians to any foreign child residing casually in *England* for health, education, or amusement; the necessary consequence of which is that the ward, till reaching the age of 21, cannot leave the realm of *England* without leave of the Court of Chancery. But the Court did not decide, and no Member of the House said, that foreign guardians are to be entirely ignored, or laid anything to countenance the notion that a guardian has been duly appointed in a foreign country, and comes into *England* or *Scotland* to reclaim a ward suddenly carried away from him, is to be treated as a stranger and an intruder. On the contrary, an alien father, whose child had been so carried away from him and brought into *England*, would undoubtedly have the child restored to him in *England* by a writ of *habeas corpus*; and I believe that the same remedy could be applied to a foreign guardian standing *in loco parentis* on the removal of his ward.

Lord Langdale, who was one of the Lords who concurred in the judgment of the House, in *Johnstone v. Johnstone* (r), said, "If it should unhappily become necessary to call upon the courts of the two countries to exercise their powers, I know of nothing which would render it impracticable for the *English* Court of Chancery to order the guardian resident in *England* to deliver up the infant to the guardian resident in *Scotland*. And if should we doubt that the *Scotch* courts would consider beneficial to the infant the same course of manage-

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ment which, upon evident consideration, had been approved by the *English* Court of Chancery, and, if necessary, order the guardian resident in *Scotland*, being the tutor or curator there, to deliver up the infant to the guardian resident in *England*? I cannot anticipate differences of opinion, or that either of the courts would have any difficulty in directing that which would be most beneficial to the infant. It is not reasonable to suppose that the courts of the two countries would conflict in such a matter. If difficulties should occur, they must be met as they best may, by adopting that course which, under the circumstances, shall appear to be for the benefit of the infant."

I must use the freedom to observe, that whatever opinion the *Scotch* judges may justly form of the decision of this House in *Johnstone v. Beattie*, they would have acted with more dignity, and more magnanimously, as well as more judicially, if they had calmly and promptly considered what was for the benefit of the infant, and had recollected that a court may not only be censured for exceeding its jurisdiction, but for declining to exercise its jurisdiction for the relief of a suitor, from the apprehension that, in another cause, its jurisdiction has been unjustifiably encroached upon by another court.

I can take upon myself to say, that *Johnstone v. Beattie*, whether properly or improperly decided, is no authority whatever for the interlocutor of the 20th *July*, appealed against. In perfect harmony with that decision, the petition praying for the restitution of the ward to the guardian might have been immediately granted.

Mr. *Palmer* argued that this could not have been done till the domicile of the infant had been determined; a period, from our experience in *Aikman v. Aikman* and other cases, which very probably would not expire till the



infant had not only reached puberty according to the *Scottish* law, but majority according to the *English*. In truth, however, although the domicile of the infant may hereafter be very important, it was of no importance then, and matters ought immediately to have been restored to the position in which they were before the fraudulent removal of the ward.

There is only one other case which I think I am called upon to notice—*Dawson v. Jay*, before Lord Chancellor Cranworth. As at first stated at the bar, it certainly seemed closely in point, and it alarmed me much; for we were told that an *American* infant, who had a guardian regularly appointed by the Supreme Court of *New York*, having been fraudulently brought to *England* against the will of the guardian, Lord Cranworth had refused to interfere, and would not order the infant to be delivered up to the injured guardian. But on the case being examined, it turns out that the infant came to *England* with the entire concurrence of the guardian originally appointed, who continued guardian at the time of the removal; and that it was another guardian, afterwards appointed with scrupulous regularity, who wished to get possession of the infant, and carry her back to *America*, after she had been living several years in *England*. It farther appeared that she was a *British* subject, though born in *America*; and the Lord Chancellor was thus called upon, without any offence being imputed to her, to sentence her to transportation to *America* by the decree of a court of equity. That case, therefore, has no application to the present.

I do not think I ought to say more upon the technical objection about evidence of the proceedings in Chancery, Mr. Palmer having very properly admitted that the judges may be considered as having pronounced the inter-

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The scheme proposed for the ward's education meets with my entire approbation; and I do trust that this interesting youth, being aware that what this House judicially ordains must be obeyed by every good subject as the law of the land, and that our only anxiety is to direct that which we conceive to be for his good, will go on auspiciously while *in statu pupillari*, will in due time take his seat in this House an accomplished nobleman, and will add fresh splendour to the illustrious house which he now represents.

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Lord Cranworth:

My Lords, it is not my intention to trouble your Lordships with more than one or two observations upon this case, for, however important it is, in truth it involves very little of principle which requires illustration.

In the exercise of the jurisdiction of the *Lord Chancellor* as representing the Crown as *parens patriæ*, and protector therefore of infants who have had the misfortune to lose their parents, and in the exercise of what is called the *nobile officium* of the Court of Session, which corresponds very much to that which exists in the *Lord Chancellor* in this country, there is but one object which ought to be kept strictly in view, and that is, the interest of the infant. Now it appears to me to be a matter beyond all controversy, that in the interlocutor pronounced by the Court of Session on the 20th of *July* 1860, that sole object which the court ought to have had in view was entirely lost sight of. Whatever order the court ought to have made, certainly that which it did make was one in which the interests of the infant were completely overlooked; for at this important period of this infant's age, when his education having been so



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lamentably neglected that every week and  
 was important, to leave the matter undecided  
 months could not have been right. It appears  
 farther, that there was sufficient before the  
 make it their duty at once to order the infant  
 delivered up to the guardian who had been appointed  
 the Court of Chancery. That is the opinion  
 been expressed by my noble and learned friends  
 entirely concurring in that, all the rest seen  
 follow as of course.

I would make a passing observation upon the  
*Johnstone v. Beattie*. Perhaps it might have been  
 decision more consonant to the principles of equity  
 to have held there that every country would  
 the status of guardian in the same way as it would  
 would recognise the status of parent, or the  
 husband and wife. But supposing that not to be  
 the view taken by this House, there is nothing  
 decision that could have been decided otherwise.  
 could at all interfere with or touch the present  
 For all that was decided there was, that the  
 guardian not being a status recognised by the  
 country unless constituted in this country, it was  
 matter of course to appoint a foreign guardian  
*English* guardian; but that that was only a matter  
 taken into consideration. That was all that was  
 in that case; and whether or not (as I have already  
 it might have been better to hold that the status  
 dian was to be itself recognised without farther  
 is quite immaterial to the present question.

My Lords, I am fully prepared to say that,  
 verse of the present case had occurred between  
 conflicting jurisdictions, I should have felt it  
 recommend your Lordships to take precisely



which I now recommend you, with the concurrence of my noble and learned friend, to take in the present case. If, for instance, an infant having *Scotch* guardians, having all his interests in *Scotland*, and having had a proper scheme for his education in *Scotland*, proposed to and sanctioned by the Court of Session in *Scotland*, had been brought to this country; I will say farther, even if it had not been brought clandestinely; I think it would have been the duty of the Court of Chancery, seeing that the scheme which had been settled by the court in *Scotland* was a proper scheme, manifestly for the interest of the infant, to order the infant to be delivered up to the *Scotch* guardian, the *Scotch* guardian applying for it in order to carry that scheme into effect. I think it ought to be understood that there is perfect reciprocity upon this subject between the two countries; and such reciprocity existing, in my opinion the suggestion of my noble and learned friend is perfectly correct, and I think the order ought to be made almost in the terms that were suggested by the *Attorney General*. I have very slightly modified them, and those terms, with the permission of your Lordships, I will read. It appearing to this House that when the Court of Session pronounced their interlocutor of 20th *July* 1860, the interests of the infant Marquis required that he should be delivered to General *Stuart*, to be educated according to the scheme settled by the Court of Chancery, and at the Court of Session ought then to have given such directions as were proper for accomplishing that object; and it farther appearing that the interests of the infant Marquis still require that he should be so educated, therefore reverse the interlocutor of the 20th of *July* and the subsequent interlocutors complained of, and refer it back to the Court of Session to make such order or

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This does not appear to me to be an interlocutory order within the meaning of the 48 *Geo.* 3, c. 151, s. 15, which applies to such orders in regular suits, and not to those relating to the custody of infants, in which every order may be considered as final; and therefore the appeal against the order of the 20th *July* 1860 is not open to this objection. But, at all events, the appeal against the orders of the 23d *November* 1860, and the 7th of *February* 1861, particularly the latter, is not open to that objection; and the important question of the custody and education of the infant may certainly be disposed of on that appeal.

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Your Lordships have therefore now to decide whether that order is proper under the circumstances of this case, which relate to the custody and education of a young nobleman, a *British* and *Scotch* Peer, having a *Scotch* domicile and origin, large possessions in *Scotland*, but much larger in *England*, but who has, in the undoubted exercise of its lawful authority, been made a ward of the *English* Court of Chancery.

I cannot have the least difficulty in saying that the Court of Session ought not to have looked at this case in a mere *Scotch* point of view, and to have dealt with it as if the noble Marquis had been solely a *Scotch* pupil. The order of the 7th *February* is therefore, in my view, wrong. It prohibits and discharges the Appellant from removing the pupil, on any pretence whatever, from the jurisdiction of that court.

The court ought, I think (though it is not necessary to say whether it was bound to do so), to have availed itself of the opportunity of giving the young Marquis a proper education, which has hitherto been unfortunately neglected, by delivering him to the care of his *English* guardian. I do not for a moment dispute that a very



ceedings, in which the courts of the two countries, instead of cordially co-operating to advance the best interests of the infant, have placed him, as it were, in the centre, as a prize to be contended for by conflicting jurisdictions. I should be sorry to see the authority of the Scotch courts broken in upon by any invasion by the English courts, but I think there was no cause for the jealousy which has unhappily been excited upon the present occasion. I agree with my noble and learned friend opposite, that if the circumstances had been reversed, if the *Scotch* court had assumed the guardianship of the infant, and the infant had been improperly removed from its jurisdiction, and the guardian had come to this country to reclaim possession of his infant ward, the *English* courts would have facilitated the guardian in his object; and I think that they would not have examined with a very nice and critical eye the proof of the orders which had emanated from the *Scotch* authority. Or, if there had been any imperfection in the proof, they would have afforded every facility for obtaining the necessary means of establishing their authenticity.

But all this has passed. Your Lordships have now by your supreme authority dictated a scheme for the care and protection of the infant. I am quite satisfied that the Court of Session will cheerfully perform everything that is required of it in order to accomplish your Lordships' objects, and that at last the lost time may be redeemed, and the infant marquis may commence a course of education becoming his high rank and his extensive fortune.

Lord *Kingsdown* :

My Lords, I entirely concur in the Order proposed.

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STUART  
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(Marquis).  
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just, and consistent with these declarations and directions and this judgment.

“ And it is ordered by the Lords, &c., by consent of all parties, that the said order of the Court of Chancery of the 9th of *February* 1861, so complained of in this appeal, be, and the same is hereby reversed; and it is farther ordered, that the costs of all parties in the matter be paid out of the estates of the infant Marquis of *Bute*; and it is also farther ordered, that the matter be, and is hereby remitted back to the Court of Chancery, to do therein as shall be just, and consistent with this order and judgment.”

1861.  
STUART  
v.  
BUTE  
(Marquis).  
STUART  
v.  
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and another.

Lords' Journals, 17 May 1861.

The ATTORNEY GENERAL - Appellant.  
JOHN FLOYER and others - Respondents.

*A.* in 1776 devised certain estates to his son *H.* for life, with remainder to the first and other sons of *H.* successively in tail male. In 1810, *H.* and his eldest son *W. J.* executed a disentailing deed, and then resettled the estates to such uses as *H.* and *W. J.* should jointly appoint, in default to *H.* for life, remainder to such uses as *W. J.* should appoint, in default to the uses limited by the will of *A.* In 1821 *H.* and *J. W.* executed a joint appointment (of the previous settled estates, and also of some now first brought into settlement by *H.*) to such uses as they should jointly appoint, then to *H.* for life, remainder to *W. J.* for life, remainder to the first and other sons of *W. J.* in tail male, remainder to the use of *G.* and *E.* (two brothers of *W. J.*) successively in tail male. No other appointment was made. *H.* died; *W. J.* entered, and died without issue. *G.* then entered, and by a deed executed in 1855 between *G.* and his eldest son *E. G.*, the entail previously created was destroyed, and the estates were conveyed to a trustee for such uses as *G.* and *E. G.* should jointly appoint, and in default, to the

1862.  
June, 13, 17,  
23,  
July 15.  
— —  
Succession.  
Duty.



tail and to bar all remainders and reversions except thereon, that a recovery might be suffered for the use of effectuating the following uses to the use of persons, and for such interest as *Henry* (the son) and *William John*, jointly, should appoint; and in default of appointment, to *Henry* (the son) for life, remainder to the uses as *William John*, if he survived his father, should appoint; and in default of appointment to the uses intended by the will of *Henry* (the father).

A common recovery was suffered under this deed in Michaelmas term, 1810.

In June 1821, *Henry* (the son) and *John William* executed a joint deed of appointment. The deed recited that *Henry* (the son) was seised of other estates besides those mentioned in the preceding indenture; that it was intended that all the estates should be held together; that *Henry* (the son) and *William John* had, by way of family arrangement, agreed to join in settling the estates thereinafter mentioned, to the uses thereinafter expressed; and that for that purpose they had agreed to exercise their joint power of appointment; and it was recited that in execution thereof they jointly appointed the estates as follows: the lands comprised in the deed of appointment to *Henry* (the son) in fee-simple, the others to such persons as *Henry* (the son) and *William John* should jointly appoint, in default to the use of *Henry* (the son) for life, remainder to *William John* for life, remainder to the first of their sons of *William John* in tail male; remainder to the use of *George* and the other brothers of *William John* successively in tail male. Powers for charging the estates for the benefit of the younger children were also reserved to *William John*, *George*, and the other brothers, as they might successively come into possession.

The joint power thus reserved was never executed.

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4,000 l. a year for life, and provision was made for his widow in case of his death, and also for the children. Under a power reserved in the deed of 1821, and in this deed, *George Bankes*, in July 1855, made his will, charging the estates with payment of sums for the benefit of younger children. He died in 1856, when only one instalment of the succession duty had become payable by him on account of his succession.

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ATTORNEY  
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v.  
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One instalment at three per cent. was claimed in respect of this succession of *George Bankes*, as derived from his brother *William John*. And as to *Edmund George*, three per cent. were claimed for his succession, as it was alleged that he took under his own disposition, and was therefore liable under the 12th section of the Succession Duties Act, as if such disposition had not been made; or if not, that he had derived his succession from his father's brother *William John*. It was also contended that the younger children of *George* were liable at the same rate, as their succession was derived under a limited power reserved to their father in the deed of 1821, which was a disposition by their father's brother, and under the settlement of July 1855 which was a disposition by their own brother *Edmund George*.

The Respondents put in their answer, and the case was heard before the Barons of the Exchequer, by whom it was decreed that *Henry* (the son) and *John William* were the "joint predecessors" of *George*, who was therefore chargeable with a duty of 1 l. per cent. upon one-half of the property as upon a succession derived from his father, and 3 l. per cent. on the other half, as upon a succession derived from his brother. Secondly, that *Edmund George* was chargeable with duty at the same rate; and thirdly, that duty was chargeable on the portions of the younger children of *George* at the rate of



life a power to charge portions for sons and daughters, subject to the life estate of the father who derived from *W. J. Bankes*. That power must be referred to the instrument creating it, and the donor, not the donee of the power, must be looked at as the predecessor. *Love-ice's case* (c); *In re Barker* (d). In the latter of these cases the husband created the power; the wife exercised after his death in favour of his niece. If the donee of the power had been treated as the predecessor, the niece, being a stranger in blood, would have had to pay ten per cent. but the donor of the power was so treated, and was held liable to pay only three per cent. The principle of that case must be applied here.

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*Mr. Rolt* and *Mr. M. Smith* (*Mr. C. Hall* was with them) for the Respondent:

The *Braybrooke* case does not govern the present; distinction is this. There the question was what is payable by a tenant in tail, who, on a re-settlement by himself and his father, has his estate tail cut down to a life estate. Here the question is, what duty payable by a third person, to whom the father and son, by disentailing deed, have limited a particular interest, the person being at the time a stranger to the settlement. The same result cannot follow in both cases. It is not the destruction of one interest and its re-creation by charge by the party interested. The persons here benefited had no power to interfere in the matter. The amount of duty here must be decided merely by the relationship of the parties giving and receiving the benefit—that relationship is that of father and son, and the lowest duty alone is payable. Suppose a father tenant for life, and, by failure of his own issue male, his nephew

(c) 4 De Gex & Jo. 340. (d) 7 Hurl. & Nor. 109.



and the son; it is a provision, the right to make which has been purchased by the father for a valuable consideration, and the cases of *Jenkinson* (*f*), and *Attorney General v. Baker* (*g*), and the observations of Baron *Bramwell* in *Yelverton's* case (*h*) apply. The power in the deed of 1855 is not a mere substitution for that in the deed of 1821, but was the result of a purchase effected by bringing new estates into settlement. As the son received from them a benefit he did not before possess, that was a purchase; and the purchase being made by a father for the benefit of his daughters, and the gift being one from him to them, the duty can only be one per cent.

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As to the 800 *l.* a year to *Edmund George*, during his father's life, it is quite clear that he was deprived of that, and according to the *Braybrooke* case (*i*) he is entitled to a deduction of duty on that account.

The *Solicitor General*, in reply:

The larger duty must be paid on all the successions here. The cases of *Jenkinson*, *Baker*, and in re *Peyton* (*j*), may be considered as establishing the principle that if I buy from a tenant in tail a sum of money, to be paid to my estate after my death, and then assign that sum to persons who are to take under me, I am, as between me and them, creating a succession in their favour, and they are liable to duty in respect of it. That is the case here. Then as to the question who is the predecessor in creating the succession, *Ramsay's* case (*k*), is an authority. There the wife brought 6,000 *l.*, and some other estate into settlement; the husband settled 10,000 *l.* of his own property on himself and wife, and the children of the

(*f*) 24 Beav. 64.

(*g*) 4 Hurl. & Nor. 19.

(*h*) 7 Hurl. & Nor. 306.

(*i*) *Ante*, 150.

(*j*) 7 Hurl. and Nor. 265.

(*k*) 30 Beav. 75.



5, and on his death *Richard Neville*, his son, who became the third Lord *Braybrooke*, became tenant life under the will, with remainder to his first and sons in tail male. In 1841 the third Lord *Braybrooke* concurred with his eldest son, who had then attained his age of 21 years, in barring the entail and settling the estate (subject to his own life estate under will, and subject also to certain terms of years for raising the payment of some annuities and other uses) to such uses as he and his said son should appoint, and in default of appointment to the use of his said son for life, with remainder to his first and other sons in tail male, with remainders over.

In 1850 Lord *Braybrooke* and his said son exercised their joint power, and appointed the estates, subject to certain annuities and charges, to the same uses as had been declared by the deed of 1841.

The third Lord *Braybrooke* died in 1858, and the question then arose as to the succession duly payable by his son, who then became the fourth Lord *Braybrooke*. He took an estate for life under the joint appointment of his father and himself. And in order to determine at what rate the duty was to be charged, it was necessary to ascertain who was his predecessor within the meaning of the Succession Duty Act, the rate of duty in all cases depending on the degree of relationship subsisting between the predecessor and the successor.

On behalf of the son it was argued that as he took, on the death of his father, under the joint appointment of his father and himself, the father was the predecessor; in which case a duty of one per cent. only would be payable on the whole estate: or if not so, then that the father and the son himself were joint predecessors, in which case a duty of one per cent. only would be payable

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tenant to the præcipe, they resettled the estates to the use of *Henry* the father for life, with remainder to *William John* for his life, with remainder to his first and other sons in tail male, with remainder to *George*, second son of *Henry*, for his life, with remainder to his first and other sons in tail male, with remainders over.

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*Henry* the father died in 1834, and *William John* the son then succeeded to the estate, and he died without issue in 1855. As he succeeded to the estate before the passing of the Succession Duty Act, the precise question which was decided in Lord *Braybrooke*'s case never arose; but if *Henry* the father had lived till 1854, instead of dying in 1834, it is certain on the authority of Lord *Braybrooke*'s case, that *William John*, on succeeding in 1854, would have been held to be the sole settlor, for the purpose of ascertaining the succession duty payable by him. If he would have been the sole settlor for that purpose, I cannot understand on what principle it can be contended that the interests of those coming after him in the settlement were derived from any other source than that from which his own interest was derived. If he would have been held to be, within the meaning of the Act, the sole settlor from whom his own tenancy for life was derived, he was the sole settlor from whom the interests of his children, if he had had any, and those coming after them in the settlement, were derived. Those interests all come out of the same estate as that out of which his own tenancy for life was derived. And the decision of this House shows that in order to ascertain who is the settlor, within the second section, *i. e.*, the settlor "from whom the interest of the successor is derived," we must inquire not who are the parties by whose conveyance the estate has been created? but who is the conveying party out of whose estate the interest



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heritance. If instead of arising under the exercise of a power given to the parent, they had been at once fixed by the settlement which created the power, there could surely be no doubt but that they must have followed the fate of the inheritance, and I am of opinion that the circumstance of their arising under a power can make no difference. Indeed this seems to be expressly provided for by the 4th section of the Act. The interest created by the power must, on well known principles, be treated as arising from the deed creating the power, and in this case it is unnecessary to consider whether we are to refer to the settlement of 1821 or to that of 1855, as the source of the power. The rate of duty will be the same to whichever settlement we refer.

It was argued that here the father ought to be considered as a purchaser of the right to appoint the portions, and so that he was the settlor from whom the interests of the younger children were derived; and this view of the case was attempted to be supported by reference to *Jenkinson's* case (*n*), and *Yelverton's* case (*o*). But those cases do not support the proposition contended for. In both those cases the court considered that the tenant for life had, in the result of his dealings with the property, become a creditor on the estate for a sum of money payable on a future day. That being so, the persons who under the disposition which he made of the money became entitled to it at his death, were properly held to be successors deriving title from him as their sole predecessor. He was, according to the decision, absolute owner of the money. But here the interests of the younger children were not derived from any fund to which *George* was entitled. He never was a creditor on the estate. The cases are therefore altogether different.

(*n*) 24 Beav. 64.

(*o*) 7 Hurl. & Nor. 306.



payable on the succession of *George*, of *Edmund George*; and of *George's* younger children is three per cent. It was not disputed by the *Solicitor General* that in calculating the sum due, allowance must be made for the annuity to which the parties chargeable with duty were already entitled when the duty accrued. There will, I presume, be no difficulty in adjusting the amount due, taking it as established that the rate chargeable is three per cent. on the estates included in the recovery of 1810.

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It was, however, admitted that a part of the estates included in the settlement of 1821 were fee simple estates of *Henry*; as to these the duty is certainly payable only at the rate of 1*L.* per cent., and with respect to the portions, they must, for the purpose of regulating the duty, be apportioned rateably between the settled and fee simple estates according to their value. The duty on so much as is attributable to the original settled estates will be assessed at three per cent.; that assessed on the fee simple estates brought into settlement for the first time in 1821, will be assessed at one per cent.

Lord *Wensleydale*:

My Lords, there is no doubt that the decision of the majority of your Lordships in the case of *The Attorney-General v. Lord Braybrooke* is just as binding as if the whole House had concurred in it, and the *ratio decidendi* in that case must govern all other cases in this House and in all inferior tribunals. We have, therefore, merely to ascertain what was the rule laid down by the late Lord Chancellor (*Campbell*) and Lord *Kingsdown*, according to which their Lordships decided, and that rule must unquestionably govern other cases.

I have given the subject every consideration in my power. My two noble and learned friends concur in a



disposition), that he was chargeable with the duty at the same rate as if no such disposition had been made.

They might have decided only, that as the new disposition made by the deed of 1856, in which he concurred, was ineffectual to alter his condition under the will of Lord *Howard de Walden* by the express provision of the 12th section it was unnecessary to make any farther inquiry whether that disposition was one by the Appellant alone, or by his father and the Appellant jointly; and, therefore, their decision upon the latter question was unnecessary and was not intended by them to be made the ground of their decision.

It is possible from what Baron *Bramwell* says as to the inapplicability of the case of *The Attorney General v. Braybrooke*, that he may have supposed (the report not being then published) that such might have been the ground of decision. But I agree, after entertaining some doubt, with my noble and learned friends, that the majority of the House in Lord *Braybrooke's* case meant to decide that the Appellant claimed the succession under a disposition made by himself and by himself only, and that he claimed the succession from himself only as predecessor, as created out of his own estate tail only. If derived from his own father's estate for life in part, he ought to have been subjected, in respect of that part, to a duty of one per cent. only. But the majority of your Lordships held that he claimed altogether under a disposition made by himself alone; and therefore was liable to the full duty of ten per cent., as he certainly would be if there had been no such subsequent disposition.

The decision in Lord *Braybrooke's* case is therefore in effect, that if the tenant in tail in remainder joins with the tenant for life in executing a general power of appointment to another, the interest of the appointee is

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his said succession for the annuity of 800 *l.* in the proceedings mentioned charged upon the same estates for the benefit of the said *Edmund George Bankes*, such annuity being apportioned rateably between the two classes of estates; and that the rate of duty chargeable upon the succession of the younger children of the said *George Bankes*, in respect of the sums appointed to them in the will of their father under the special power contained in the said indentures, or either of them, so far as the same are charged upon the estates re-settled by the indenture of the 3d of *July* 1855, excepting the estates brought into settlement in the year 1821, as above mentioned, is three per cent, and so far as the same are charged upon the estates so brought into settlement in the year 1821, is one per cent., and that for the purpose of ascertaining the amount of duty that ought to be paid on the said sums the same are to be rateably apportioned on the said respective estates according to the value thereof respectively. And the cause is remitted, &c.

Lords' Journals, 15 *July* 1862.

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v.  
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The ATTORNEY GENERAL - - *Appellant.*

Sir F. C. SMYTHE, Bart. - - *Respondent.*

*A.* being seized of certain estates in fee simple by a marriage settlement executed in 1812, conveyed them to the use of himself for life, remainder to the use of his sons in tail male successively. *A.* had three sons, *E.*, *R. P.*, and *C. F.* In 1840 *A.* and his eldest son, *E.*, executed a disentailing deed, and conveyed the estates to such uses as they should appoint, and, in default, to the uses of the settlement of 1812. In the same year *A.* and *E.*, on the intended marriage of *E.*, appointed to the use of *A.* for life, remainder to *E.* for life, remainder (subject to certain provisions for the intended wife and the younger children) to the first and other sons of the

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use of *Richard Peter Carrington Smythe*, the then second son of *Sir E. J. Smythe*, and his first and other sons successively in tail male, remainder to *Charles Frederick Smythe*, the then third son of *Sir E. J. Smythe*, and his first and other sons successively in tail male. The marriage took place on the 28th *April* 1840, and on the 28th *August* 1841, *Mr. E. J. Smythe* died without issue, and without having exercised the power of appointment.

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On the 11th *May*, *Sir E. J. Smythe* and his then eldest son, *Richard Peter Carrington Smythe*, executed a disentailing deed, and thereby conveyed the estates to such uses as they should jointly appoint, and in default of appointment, to such uses as were then subsisting concerning the same. On the 12th *December* 1843, they joined in executing this power of appointment by a deed appointing the estates to *Sir E. J. Smythe* for life (with provisions for certain members of the family), remainder to *Richard P. C. Smythe* for life, and to his first and other sons in tail male, remainder to *Charles Frederick Smythe* for life, remainder to his first and other sons in tail male, with an ultimate remainder to *Sir E. J. Smythe*, his heirs and assigns for ever.

*Richard Peter Carrington Smythe* died without issue in *September* 1853, and the Respondent *Charles Frederick Smythe* thereupon became first tenant in tail in remainder, and on the death of his father, *Sir E. J. Smythe*, 11th *March* 1856, succeeded to the baronetcy and entered into possession of the estates. The duty of 3 *l.* per cent. was claimed, on the ground that the Respondent must be treated as having derived the succession from his elder brother. The Respondent insisted that he either derived it wholly from his father, or partly from his father and partly from his brother.

The Court of Exchequer, on the 6th *July* 1861, gave judgment in favour of the Respondent, holding that it was



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The son here never had any estate which he could dispose of without the father's concurrence. [Lord *Chelmsford*: The consent of the father merely enabled the son to cut off the remainders.] The cases of *Sibthorpe* (b), *Peyton* (c), and *Braybrooke* (d), did not put a construction on the 2d section; they all proceeded on the 12th section of the statute. In construing the 2d section, the person from whom the estate is derived must be considered. Now, the settlement of 1812 here is equivalent to the will of Lord *Howard de Walden*, in the *Braybrooke* case; and that settlement, the original of all the estates, was made by the father of the Respondent, and created the interest which the Respondent now possesses. The 13th section directly applies to this case, and seems to have been executed with a view to provide for such a case. If the donee of an absolute power of appointment appoints to his own son in fee, surely it is from the father and not from any one else that the son derives his succession. Take the converse of that. A man seised in fee settles an estate by deed, and the first use is a general power of appointment given to a stranger; the stranger appoints to the son of the donor. The Crown would not be satisfied in such a case with less than ten per cent., yet the principle sought to be applied here ought there to prevent the payment of that duty. A person with an absolute power of appointment in himself is a disposer; if he has a joint power he is equally so. *Braybrooke's* and *Peyton's* cases are explainable upon this ground, that no one is to be permitted by his own act to diminish the amount of duty he would have to pay. That does not apply to this case, where the Respondent has not done anything, but takes under a settlement made by his father.

(b) 3 Hurl. & Nor. 424. (c) 7 Hurl & Nor. 265.

(d) *Ante*, 150.



1861.

28 June.

EDMUND BACKHOUSE - - *Plaintiff in Error.*

IGNATIUS BONOMI and WIFE *Defendants in Error.*

*Right of  
Property.  
Easement.  
Mines.  
Statute of  
Limitations.*

The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property ; and till that is interfered with he has no legal ground of complaint, although, in fact, something may have been done which (without his knowledge), has occasioned results that will afterwards affect his property.

A. was the owner of certain houses standing on land which was surrounded by the lands of B. C. and D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B. C. and D. sank in ; and after more than six years' interval their sinking occasioned an injury to the houses of A. :

Held, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the Statute of Limitations.

THIS was an action commenced by a writ of summons, dated 20th May 1856, and brought by *Bonomi* and his wife to recover damages, for an injury occasioned to certain houses of theirs, in the occupation of tenants. The declaration alleged that the Plaintiffs " were entitled to have the said messuages and buildings supported ; to wit, by the mines, earth, and soil underground, contiguous and near to and under the said messuages and buildings : yet the Defendant, well knowing the premises, wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support in that behalf, worked certain coal mines underground, contiguous and near to, and under the said messuages and buildings, and dug for, and got, and took away coals, earth, and soil out of the mines, and wrongfully and unjustly kept and continued the said messuages and buildings, and caused them to be and remain, without any proper or reasonable or



sided, cracked, swayed, and gave way. of the premises Plaintiffs have been and their reversionary estate and interest in suages and buildings, &c."

The Defendant, who was the owner of ated underneath the houses, pleaded, 1 2nd, a denial of the occupancy; 3rd, deni reversion; 4th, denial of the alleged rig and 5th, that the alleged causes of action within six years before this suit. Issue each of these pleas.

When the cause came on for trial at. referred to Mr. *Hindmarch* to find the fact cause of the damage, with dates. Mr. *Hi* a special case, in which it was, among of forth that the Defendant in 1849 "worked the pillars of coal which he had previously under about two acres of *Daniel Simpson's* formed what is called '*Simpson's goaf*,' v 280 yards from the Plaintiff's property. ' the pillars of coal in *Simpson's goaf* was co the latter end of the year 1849, since which not been any working in *Simpson's goaf* the rest of that part of the mine began



nences resulting from a ‘thrust’.” He then found that the “thrust” produced the usual effects on the surrounding lands, and that those effects gradually extended; that as the thrust in its progress arrived at any land in which the coal had been worked, the earth and material above the pillars of coal were dislocated and disturbed to such an extent, as to throw down or crush the pillars of coal which had been left to support the roof of the mine, and then the roof fell, and the superincumbent strata and also the soil, subsided gradually, but also irregularly.”

. . . “The Plaintiffs’ houses and buildings were not injured before 1854, but during the course of that year the thrust and its injurious effects began to operate upon the Plaintiffs’ land, the pillars of coal underneath were thrown down or crushed, and consequently the surface of the land, the foundation of the Plaintiffs’ houses and buildings, and the various strata of stone and other materials” were injured as described in the declaration. “Since 1854 the Plaintiffs’ land has been farther disturbed, and farther subsided, in consequence of the continued operation of the thrust above mentioned, and the Plaintiffs’ house and buildings had, in consequence, received farther damage between that year and the commencement of this action, 2 May 1856. Before this subsidence first commenced in *December* 1854, the Plaintiffs did not know, and had no reason to suspect, that the thrust which was the cause of such disturbance and subsidence was in operation or existence, nor had they any knowledge of the way in which the Defendant had worked the mines under *Simpson’s* land so as to create *Simpson’s* goaf, and to produce the thrust above mentioned. This thrust was the sole cause of the damage to the Plaintiffs’ houses.” Since the commencement of the action farther subsidence had taken place and the value of the house and build-

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ings was much diminished. The Defendant did not take any steps to arrest the progress of the thrust or to prevent it from extending. If the coal mines under the lands surrounding the Plaintiffs' house had been left unworked to a sufficient distance from the houses, they would not have sustained damage. The Defendant might also have supported the roof in such a manner as to prevent it; but the expense of doing so would have been larger than the value of the property injured.

On this finding, judgment was given in the Court of Queen's Bench (Mr. Justice *Wightman* dissentiente) for the Defendant, on the ground that the cause of action had occurred more than six years before action brought (*a*). The case was taken, on error, to the Exchequer Chamber, where the judgment was reversed (*b*). The present proceeding in error was then brought.

The Judges were summoned, and Lord Chief Baron *Pollock*, Mr. Justice *Wightman*, Mr. Justice *Williams*, Mr. Justice *Blackburn*, Mr. Justice *Byles*, and Mr. Baron *Wilde* attended.

Sir *F. Kelly* and Mr. *Phipson*, for the Plaintiff in Error :

The real cause of action here was the removal of the supports. When they were taken away the injury was complete, and the right of action arose.

[Lord *Chelmsford*: The thrust was not immediately injurious to the land, but was ultimately the cause of the injury.

The *Lord Chancellor*: But you say that the consequences of that thrust might have been foreseen as soon as the thrust occurred.]

(*a*) *Ellis*, Bl. & El. 622.

(*b*) *Id.* 646.



That is so. In 1849 pillars were removed: the thrust followed; the foreseen and inevitable consequence was the mischief of which the Plaintiffs below complained, therefore the *causa causans* was the removal of these pillars. On that the right of action was complete, and the action might have been brought, *Humphries v. Brogden* (c). In *Nicklin v. Williams* (d), it was held under circumstances exactly similar to the present, that the cause of action was the injury to the Plaintiffs' right to have their land and houses supported by the contiguous land and strata of coals, and therefore when any part of the necessary support was removed, although there was no actual damage, there was a complete cause of action, for which the Plaintiffs might have recovered prospective damages; and no new cause of action arose from the subsequent damage. The principle is that the right of action is complete as soon as the wrongful act is done, and that was why, in that case, as Mr. Baron *Parke* observed (e), "The agreement and its performance were an answer to the then existing cause of action." [Lord *Brougham*: Do you take *Nicklin v. Williams* to go farther than this, that it is the damage, and not the cause of the damage, which gives the complete right of action?—Lord *Chelmsford*: Suppose a man in such a case as this to put up an artificial support, which is insufficient, at what time would the cause of action arise?] From the moment that the insufficient support is put up; and the owner of the house is not bound to wait till actual damage occurs, but may bring his action at once. The rule is stated in *Tellor v. Spateman* (f), and applies directly to this case, notwithstanding the distinction set up by Mr. Justice

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(c) 12 Q. B. Rep. 739.

(e) Id. 267.

(d) 10 Exc. Rep. 259.

(f) 1 Wm. Saund., n. (2) 346 b.



[The *Lord Chancellor*: How can there be a wrong for which a man is bound to seek redress if he has no notice of it?]

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The case of a solicitor taking a security on a bad title is a case of that kind, which, though not quite parallel with the present, is an illustration of the rule that a right of action may exist and the statute operate on it, though the party injured did not know of its existence. *Ashby v. White* (h) settled, that in the case of the violation of a right the law will presume a damage, and right of action will arise. This doctrine was expressly adopted in *Embrey v. Owen* (i). Where, therefore, there is knowledge of an act done which all men know must produce damage, though the damage has not then actually arisen, the right of action is complete, and the statute comes into operation.

Mr. *Manisty* and Mr. *J. R. Davison*, for the Defendant in Error:

The principle in *Nicklin v. Williams* (j) need not be disputed, but that case does not apply here. When that case was decided, it was generally assumed that rights of the nature which exist here were mere easements, and the doctrines with relation to easements were too largely applied to them. It is now settled that they are not mere easements, but rights which exist *jure naturæ*, and are therefore governed by entirely different principles. Besides, the injury done there was known when the act was done, and an action was brought for damages and damages agreed to; and all that that case decided was, that consequential damage from the same cause would not afterwards give a fresh right of action. The act done in this case was a perfectly innocent act at the time it was done; the argument on the other side is, that it must be

(h) 2 Lord Raym. 938.

(j) 10 Exc. Rep. 259.

(i) 6 Exc. Rep. 353-368.



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treated as having been then injurious, because it afterwards become so. If the action had been brought when the act was first done the answer would have been that the Defendant had a right to do the act, and that no damage had been occasioned. In *Rowbotham v. Mr. Justice Cresswell* said (*k*), "the owner of the land might have removed every atom of the minerals and been liable to an action if the soil above had not been removed. In such case the consequential damage is the cause of the action, and the Statute of Limitations will run only from the time when the injury was sustained, and not from the time when the act was done." *Roberts v. Read* (*l*) is a distinct authority for that proposition, and that is the answer, too, to the case supposed on the other side of the house situated between the lands of *B.* and *C.*, and *C.* injured, not when *B.* excavated his land, but when *C.* was so too, and thus occasioned the effect of *B.*'s excavation to manifest itself. *Clegg v. Dearden* (*m*) does not support this case, for there the act done was wrongful at the time, here it was innocent at the time, and nothing but consequential damage gave a ground of complaint. The same answer may be made to *Howell v. Young* (*n*) in that class of cases where solicitors have accepted of titles on investments of their clients' money.

Here the action is for an injury to the reversion, it can only be maintained by showing that the reversioner is really injured.

Sir *F. Kelly* replied.

The Lord Chancellor (Lord *Westbury*):

My Lords, this case has been rendered of great importance by reason of a difference of opinion which

(*k*) 8 Ell. & Bl. 157.

(*l*) 16 East. 215.

(*m*) 12 Q. B. Rep. 570.

(*n*) 5 Barn. & Cres. 2.



**between** the majority of the Judges in the Court of **Queen's Bench**, and the Judges sitting in the Court of **Exchequer Chamber**. Your Lordships have therefore **deemed** it right to hear the case at length; and I will **now** submit to your Lordships the following question as **fit to** be proposed for the opinion of the learned Judges **who are** in attendance: "*A. B.* is the owner of a house, *C. D.* is the owner of a mine under the house, and under the surrounding land; *C. D.* works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can *A. B.* bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?"

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The learned Judges asked leave to retire to consider this question, which, having been granted, they were absent for a short time; and, on their return,

The *Lord Chief Baron* said: My Lords, I am desired by my learned brothers to deliver our unanimous opinion in reply to your Lordships' question. We are all of opinion that *A. B.* may bring an action at any time within six years after the mischief done, and we are of that opinion for the reasons given in the judgment of the Court of Exchequer Chamber (o).

The *Lord Chancellor*:

My Lords, we are much indebted to the learned Judges for giving an immediate answer to the question, and I think your Lordships will agree with me, that no

(o) Ell. Bla. & Ell. 654.

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is not actionable in itself, but under which special damage may arise and does arise to somebody afterwards, the person complaining of that special damage can bring no action till he has sustained actual damage. It is true that in such a case the express language of the Statute of Limitations prevents the bringing of any action after two years from the words spoken. But for that express provision, such a case would furnish an analogy to the case now under discussion. I will only therefore say, that both on the grounds stated by my noble and learned friend on the woolsack, and on those expressed by the Court of Exchequer Chamber, I entirely concur in the opinion that the judgment below should be affirmed.

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*Lord Wensleydale :*

My Lords, I entirely concur in the opinion which has been delivered by the learned Judges. I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment.

*Lord Chelmsford :*

My Lords, I entirely concur with my noble and learned friends, and I can add nothing to what they have said.

Judgment of the Court of Exchequer Chamber affirmed with costs.

Lords Journals, 28 June 1861.

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guarantie of the Respondent, for loans not to exceed 20,000 l.; but the Appellants were always to retain in their hands a sum of 4,000 l., to constitute a "lodgment account." This guarantie was shortly afterwards given up, the Appellants being satisfied with having the name of the Respondent, or of his firm, to the bills discounted by them for *Mare*. The lodgment account, however, continued to exist. The transactions became unsatisfactory, and the Appellants refused to make farther advances, except on the security of a mortgage for 20,000 l. *Mare* had previously obtained from the *Palladium* office an advance of money by way of mortgage, and had given to that office, on the 6th *January* 1855, a first mortgage on his estates in the counties of *Chester* and *Cambridge*, to secure the sum of 45,000 l. A second mortgage was executed by *Mare* on the 26th *January* 1855. This included the previously mortgaged property, and also *Mare's* property at *Blackwall*. It was in favour of the Appellants, was negotiated with the full knowledge of the Respondent, and his own solicitors acted on the occasion as the sole solicitors in the transaction for *Mare* and for the Appellants. This mortgage recited that which had been given to the *Palladium*, and was witnessed to be given for effectually securing unto the Appellants the "sum or sums of money which then was and were, or at any time and from time to time thereafter, should or might be due or owing to them" on the balance of the account current of *Mare*; subject to redemption "on payment to the Appellants on demand of all and every the sums and sum of money which then were or was, or at any time and from time to time thereafter, should or might become due or owing" from *Mare* to the Appellants either for money paid and advanced, or to be paid and advanced by the Appellants unto *Mare*. Provided that the

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Appellants delivered to him an account, headed “ Balance of loan account,” which was in these terms :

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|-----------------------------------------|---------|
| “ Loan granted 21 <i>July</i> 1855 :    | £.      |
| Ships - - - - -                         | 8,000   |
| Loan granted 15 <i>September</i> 1855 : |         |
| For wages - - - - -                     | 7,400   |
|                                         | <hr/>   |
|                                         | 15,400  |
| Less amount of lodgment account -       | 4,300   |
|                                         | <hr/>   |
|                                         | 11,100” |
|                                         | <hr/>   |

On the 25th *September* 1855 *Mare* was declared a bankrupt, at which time the sum claimed by the Appellants to be due to them, amounted to 41,000*l.*, of which 30,000*l.* were for bills which had been discounted for him, and had not then arrived at maturity. These were afterwards paid by the persons liable thereon, and then 11,000*l.* were claimed as remaining due.

On the 13th *November* the Respondent, who had been called on to pay what was due from him on *Mare*’s dishonoured bills, gave notice to the Appellants that he should, on concluding such payment, require all the securities held by the Appellants to be delivered up to him.

In the year 1856, under orders of the Court of Bankruptcy, the estates in the counties of *Chester* and *Cambridge* were sold ; but they did not satisfy the demand of the *Palladium* office. The sale of the premises at *Blackwall* then took place, and the reserved bidding of 55,000*l.* was fixed by the Court of Bankruptcy, and,



were entitled to the 11,000*l.* as the balance on *Mare's* account current, secured by the indenture of the 26th *January* 1855, out of the proceeds of the sale of the *Blackwall* property in priority to the claim of the Respondent under the indenture of the 12th *February* 1855. The cause was heard before the *Master of the Rolls*, and on the 29th *May* 1858 his Honor made an order declaring the Respondent entitled to priority over the Appellants, and directed accounts accordingly (*b*). This order was confirmed on appeal to the *Lord Chancellor*. The present appeal was then brought.

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Mr. *Rolt*, and Mr. *Lloyd* (Mr. *E. Lloyd* was with them), for the Appellants :

The mortgage of the 26th *January* 1855 was intended to be a continuing security for any balance of account for the time being, not exceeding 20,000*l.*, and this was perfectly well understood by the parties to it. The Respondent, with whose full knowledge it was executed, so understood it. If there was any doubt as to the real intention of the parties in executing this indenture, there ought to have been an inquiry directed as to that point. That the Respondent understood it to be a continuing guarantee to this amount, is shown by the fact that after the 12th *February* 1855, when the mortgage had been granted to him, he continued to accept bills for *Mare*, which he knew were to be, and which were in fact, discounted by the Appellants. He had the best means of knowledge of *Mare's* circumstances, not only through his near relationship to *Mare*, but also because their offices were in the same building, and because his own confidential clerk, *Joseph Payne*, constantly acted in the same

(*b*) 25 Beav. 461.



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capacity for *Mare*; and he showed that he had this knowledge by the notice he gave before the advances of the 8,000*l.* and the 7,500*l.*

The question of priorities is not raised by the Respondent's bill, which is the bill of a surety and not of a mortgagee, and consequently the Plaintiff is not entitled to that relief which a mortgagee might ask from the Court. That question cannot now be relied on by him. But if it should be considered competent to him to raise that question, then it is submitted that the terms of the mortgage to the Appellants distinctly entitle them to priority in respect of advances made by them after the date of that instrument. Those terms were perfectly well known to the Respondent, and the decision of the Court below is, therefore, correct; and it is fully warranted by that of *Gordon v. Graham* (c).

It is true that that case has had some doubt thrown on it in a note by Mr. *Coventry* in his edition of "*Powell on Mortgages*" (d); but Mr. *Powell* adopted it in the text, and it has always been acted on, and Mr. *Coventry* only

(c) 7 Vin. Abr. 52. pl. 3. The report is in these words: "A. mortgages to B. for a term of years, to secure the sum of £. already lent to the mortgagor, as also such other sums as should hereafter be lent or advanced to him. Afterwards A. makes a second mortgage to C. for a certain sum, with notice of the first mortgage, and then the first mortgagee, having notice of the second mortgage, lends a farther sum. *The question was, on what terms the second mortgagee shall redeem the first mortgage.* Per Cowper, C. The second mortgagee shall not redeem the first mortgage without paying all that is due, as well the money lent after, as that lent before the second mortgage was made; for it was the folly of the second mortgagee, with notice, to take such security. But upon the importunity of counsel, it was ordered that the *Master* should report what money was lent by the first mortgagee after he had notice of the second mortgage. M.S. Rep. Pasch.; 2 Geo.: Canc; *Gordon v. Graham*." With the exception of the words in italics, the report in 2 Eq. Cas. Abr. 598, p. 16, is almost literally the same.

(d) Ed. by Coventry, 834.



hesitates a doubt about it—a doubt upon which, he himself says, he places but slender dependence (*e*). It never was seriously impugned by any judicial authority till, in *Shaw v. Neale*, the *Master of the Rolls* said (*f*), “This decision has not met with the unanimous approbation of the profession.” His Honor there refers to an observation made upon it by Lord Chancellor *Sugden* in *Ireland* in the case of *Blunden v. Desart*, where his Lordship is supposed to have expressed his dissent from it. He said (*g*), “Even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves farther consideration, whether it would be safe to rely, in all cases, upon *Gordon v. Graham* as an authority that advances may be safely made after the first mortgagee has notice of a second mortgage.” That observation does not impeach the authority of the decision, but only suggests caution as to the circumstances in which it is to be applied. When that case of *Shaw v. Neale* afterwards came before this House (*h*), Lord *St. Leonards* said (*i*), “If Lord *Cowper* had, in the end, maintained the opinion he was at first supposed to express, he could not have made the order of reference to the *Master* which is found in that case.” Here again is a mere incidental observation which does not go to the authority of the case itself, and yet, if that case is not overruled, there can be no ground for the Respondent’s argument. Even, however, if that case should not be held to govern the present, the circumstances here are adverse to the claim of the Respondent; he was a mere surety; he was fully aware of every proceeding; he

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(*e*) “The editor, in submitting these remarks to the consideration of the learned reader, desires to add, that individually he places but slender dependence in the force of their application, p. 534, n. (*e*).”

(*f*) 20 Beav. 181.

(*h*) 6 H. L. Cas. 581.

(*g*) 2 Dru. & War. 405.

(*i*) Id. 597.



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capacity for *Mare*; and he showed by the notice he gave 8,000*l.* and the 7,500*l.*

The question of priority of the bill, which is the gagee, and consequently that relief which a creditor is entitled to. That question can be decided by the Court. It should be considered. The question, then, is whether the mortgage to the Respondent is prior to the mortgage to the Plaintiff, as well as an extension of time, notwithstanding the fact that the Plaintiff may attach all the Court's priority and prejudice to the Plaintiff. It was true he might do so, but he actually sold his equity of redemption, which is absurd. The case of *Coventry* does not warrant such a decision, as it has not met with the assent of the Court. It does Mr. *Coventry* assert it in his "gages," but Mr. *Jarman* and Mr. *Bythewood's Conveyancing* express their disapproval of its correctness (j). In practice, the Court has not acted on that case as an authority, and has entered the disparaging criticisms of Lord *St. Leonards*. It cannot be an authority. As a matter of business, at the moment he receives notice of a second mortgage, he should be careful to register it.

(j) *Jarman's Bythewood* (1832), vol. i. p. 443. Sweet (1839), vol. v., p. 443. The argument is a close examination of the reports of that case, and of the facts. See *post* for the statement of the Registrar's Book, and for the remarks after the copy of the Registrar's Book has been made.



balance of what is then due, and opens a new account. Each new advance after that is a new contract, and cannot by mere implication be tacked on to the former.

The circumstances here do not warrant the argument that the Respondent gave up his right to stand on his own mortgage according to its priority.

The form of the bill is sufficient to warrant the relief here granted. The bill is not that of a mere surety; and, besides, it shows that the 8,000 *l.* were advanced not on the first mortgage, but on a new and a distinct authority, and that the 7,500 *l.* were advanced on no authority at all, and it expressly claims priority over both.

[The *Lord Chancellor*: Even though the first prayer in the bill might be considered to have a different aspect, if the third is warranted in law and fact the Respondent is entitled to this relief.]

It could not be pretended that the Respondent entered into a security to stand responsible for any sum not beyond 20,000 *l.* that might be at any time advanced; and, if not, there is no answer to the bill.

The Lord Chancellor (*Lord Campbell*):

My Lords, this appeal raises a question of great importance to bankers, and to the mercantile interests of the country.

Independently of any particular agreement between these parties, either express or to be implied from their dealings, beyond what is to be found in the written documents, I think the question is accurately as well as tersely stated by Lord Chancellor *Chelmsford* in the judgment appealed against, "A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after

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reporter, the bill was filed by *Patrick Gordon* and *William Gordon* against *William Graham*, *John Montgomery*, *Elias Turner*, *Edmund Lassells*, *Richard Lee*, and *Jacob Douglass*, the Plaintiffs alleging themselves to be partners with and creditors of the Defendant *Graham*, and claiming as such a sale of certain lands of *Graham* in Lincolnshire, which, subject to prior mortgages in the Defendants *Turner* and *Montgomery* respectively, had, by *Graham's* direction, been conveyed upon trust for sale, with a view to payment of what was due from him to the partnership.

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The material facts appear to have been as follows: In the year 1707, Sir *Richard Hutchinson*, being seised in fee of the lands in question, borrowed 1,800 *l.* of the Defendant *Graham*; and for securing the repayment thereof, with interest, by indenture dated the 29th of September 1707, demised the premises to the Defendant *Lassells*, his executors and administrators, for 1,000 years, in trust for *Graham*, under a proviso to be void upon repayment of the 1,800 *l.* and interest at a day long past before the bill was filed.

In August 1711 more than 2,000 *l.* was due to *Graham* from Sir *Richard* upon this mortgage; and *Graham* being himself indebted upon an unsettled account to the Defendant *Turner*, *Lassells*, by an indenture dated the 7th August 1711, and endorsed on the mortgage of 1707 by *Graham's* direction, assigned to *Turner* the premises therein comprised, to secure not only what monies were then due, but also all such farther sums as should afterwards become due from *Graham* to *Turner*, subject to such equity of redemption as the premises were subject to by virtue of the said mortgage.

Subsequently, *Graham* contracted with Sir *Richard* for the purchase of his remaining interest in the premises





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(consisting of the equity of redemption in the term and the reversion expectant upon its determination) for a sum of 2,009 *l.* 14 *s.*, part of which was to be advanced by and secured to the Defendant *Montgomery*. And by lease and release dated the 3d and 4th *January* 1711, Sir *Richard*, in consideration of 2,009 *l.* 14 *s.* therein mentioned, to be then paid by the Defendant *Montgomery*, conveyed the premises to the use of *Montgomery* and his heirs; and thereby covenanted that the premises were free from all incumbrances except the mortgage to *Lassells* in trust for *Graham*, and declared that there were then due, for principal and interest on the said mortgage, 2,184 *l.* 6 *s.* 3 *d.*

Only 900 *l.* (part of the 2,009 *l.* 14 *s.*) were *Montgomery's* own money. The bill alleged, and all the Defendants except *Montgomery* admitted, "that the remainder was the proper money of the Defendant *Graham*, and that *Montgomery* was trustee in the said deeds for the said *Graham* in respect thereof, which trust *Montgomery* declared by the same deeds." *Montgomery* by his answer says the conveyance was made to him "as a security for paying to him in the first place 900 *l.*, and then to secure the payment of what was due to the partnership;" i. e. to the Plaintiffs. But the Plaintiffs do not so state their case in the bill, and the discrepancy is immaterial.

In 1713, *Graham* being largely indebted to the partnership in which he was a partner with the Plaintiffs, and in which *Montgomery* also was a partner, *Montgomery*, with his consent, by indenture of lease and release dated the 24th and 25th *August* 1713, conveyed the premises to the Defendant *Douglass* and his heirs. This deed is stated by *Douglass* in his answer to have been "in order to a sale of the premises, and that the money arising thereby might be applied, first in payment of what was



due to *Turner*, then of the 900*l.* to *Montgomery*, and the surplus towards satisfying the debt due from *Graham* to the partnership."

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*Douglass*, finding difficulties likely to arise, declined acting under this deed; whereupon the Plaintiffs filed their Bill against *Graham*, *Montgomery*, *Turner*, *Lassells* and *Douglass*, charging that *Turner*, under pretence of his mortgage, had entered on the premises and received the rents and profits thereof ever since, and applied the same to his own use, without ever accounting; and praying to have a discovery of what conveyances had been made of the premises, and for what consideration they were respectively made, and to have an account of the rents and profits of the mortgaged premises, and that the same might be sold, and that the Plaintiffs might, out of the rents and profits and money arising by the sale of the premises, be paid what was due to them on account of the partnership.

The Bill represented the mortgage to *Turner* to be "for securing unto him what money was then due from *Graham*, and which was then computed and reckoned to be 600*l.* or thereabouts," and *Montgomery* by his answer, makes a similar statement with the view of cutting down *Turner's* security.

*Turner* on the contrary, by his answer says, "that the deed of mortgage and premises were assigned to him for securing what was or should afterwards be due to him from *Graham*, which was not so small a sum as 600*l.*, as in the bill alleged; but *Graham* owed *Turner*, at the time of executing the assignment to him, 1,300*l.* principal money, besides a considerable sum for interest and money laid out for him by *Turner*, who hath since also advanced monies to the Defendant *Graham*, and the accounts between them are not adjusted." Of the monies so ad-



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vanced, one sum only, amounting as it afterwards appeared to 300 *l.*, was advanced by *Turner* after the date of *Montgomery's* mortgage of *January* 1711.

*Turner*, by his answer, admits, that at the date of his answer he had notice of the deeds of *January* 1711, but there is nothing to show when first he had such notice. He admits, that at the date of his answer he had seen the conveyance of the 25th of *August*, 1713, which would properly disclose the deeds of *January* 1711 ; but it does not appear when first he saw that conveyance. His words are:—"This Defendant saith, that he doth not know what conveyance hath been at any time made of the said premises by the said *Montgomery*, by the consent of the said *Graham*, to *James Douglass*, in the bill named; but believes that some such conveyance was executed as in the bill for that purpose is set forth; for that this Defendant remembers some such conveyance was *some time since* shown to this Defendant, but this Defendant doth not remember the date or contents thereof."

*Montgomery*, on the other hand, admits in the clearest terms, that before he took his security of *January* of 1711, *Graham* informed him of *Turner's* mortgage, and promised "to assign and transfer to some other person, in trust for *Montgomery*, his (*Graham's*) right to the mortgage, after payment of what should be found due to the said *Turner*, being then computed about 600 *l.*"

The following extract from the Minute Book of the Registrar, 1716 (Lib. A., 171 *b*), contains a minute of the decree and of what took place at the hearing. The Registrar seems to have taken note of the argument on both sides, as well as of the judgment. "*Mercurii, 25<sup>o</sup> die Aprilis, 1716.—Gordon v. Graham.—Hamilton*, for Plaintiff: The scope of the bill is to have lands sold for satisfaction of one demand. *Bedford*, for Defendant *William*



*Graham*, opens his answer. *Williams*, for Defendant *Montgomery*, opens his answer. *Mead* opens the answer of *Elias Turner*. *Edwards* opens the answer of the Defendant *Lassells*. *Williams* opens the answer of the Defendant *Richard Lee*. Mr. Sergeant *Jekyll*, for Plaintiff: The chief question is upon the Defendant *Turner's* demand. Mr. *Cowper*, for Plaintiff: The mortgage, 7th August 1711, assigned to Plaintiff (m); read, deed 25th August 1713. Read *Cur. Decree*: The partnership account to be taken in the first. If, in taking thereof, any account stated shall appear the same is to stand, and the *Master* is not to travel into the same farther than that the parties be at liberty to falsify or surcharge the same; and to answer what shall be coming on this account of the partnership. Let a sufficient part of the monies arising by the sale hereafter directed be reserved to pay the common debt of the partnership; and in order to satisfy *Graham's* debt, by his consent, decree the estate by him purchased of *Hutchinson* to be sold to the best purchaser can be got for the same, to be approved by the *Master*. Out of the money arising by the sale, let *Turner* be paid his debt, in the first place; and for that purpose let the *Master* see what is due to him as advanced or lent on this mortgage, and if the *Master* shall find more money advanced on the credit of this mortgage after the 25th of August 1713, he is to state the same specially; and after *Turner* shall be paid his principal, interest, and costs, then *Montgomery* is out of the money arising by sale, to be next paid his principal, 900 l., with his interest and costs, to be computed and taxed by the *Master*; and the rest of the money arising by sale is to be liable to make good what the Defendant *Graham* shall be found to be

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(m) This should be "to Defendant *Turner*," and is so stated in the previous entry in the Registrar's Book. See *ante*, 525.



4,633 *l.* 14 *s.* 7 *d.*, for which he, the *Master*, had computed interest to the 29th of *September* then last, amounting to 2,281 *l.* 8 *s.* 5 *d.*, making in all 6,915 *l.* 3 *s.* And he found that *Turner* had received of *Graham* and for his use, and of the receiver of the rents and profits of the premises, several sums of money, amounting in the whole to 5,148 *l.* 13 *s.* 9 *d.*, for which he (the *Master*) had likewise computed interest, amounting to 1,557 *l.* 4 *s.* 4 *d.*, making in all 6,705 *l.* 18 *s.* 1 *d.*, which being deducted out of the said 6,915 *l.* 3 *s.*, reduced the same to 209 *l.* 4 *s.* 11 *d.* remaining due to *Turner* from *Graham* for principal and interest on the premises on question. The *Master's* report contains, in two schedules, the particulars of the monies advanced and received by *Turner* respectively, consisting in each case of a vast variety of items in the form of a running account. It mentions only one item (the sum of 300 *l.* already referred to) as having been advanced after the 25th of *August* 1713. The date of this advance was 13th *October* 1713. Of the entire amount advanced by *Turner* (4,633 *l.* 14 *s.* 7 *d.*), this was the only advance made subsequently to *Montgomery's* mortgage. The order confirming the *Master's* report is not to be found, but we may presume that it was confirmed.

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Now, my Lords, such being the facts of the case, the question is, whether they are correctly stated in the Report in *Equity Cases Abridged* and in *Viner*, and whether the decree justifies the proposition of law deduced from it by the reporter, and for which it is now cited by the Appellants as an authority; viz., "That a first mortgagee, with a mortgage covering future advances, has priority, not only for what may be due to him at the time of a second mortgage, but also for advances made by him after notice of such second mortgage."

It appears to me that the statement of the case in both



nothing can now be ascertained ; but this much is clear, that Lord *Cowper* by his decree gave *Turner* priority in respect of no single advance shewn at the hearing to have been made with notice of any incumbrance subsequent in date to his own.

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For these reasons it appears to me that both reports are incorrect, and that the decree does not justify the proposition of law for which it is now cited as an authority.

Although the case of *Gordon v. Graham* appears to be misreported, and the inquiry which Lord *Cowper* certainly directed is inconsistent with the rule he is supposed to have laid down, still if that rule has been adopted and acted upon as the doctrine of the courts, I think it ought not now to be disturbed. The rule is repeated by treatise writers, as all rules are which are to be found in books of reports (even of such doubtful authority as 2 *Equity Cases Abridged*), until they have been overruled. I do not find any case in which this rule has been judicially acted upon, and on several occasions it has been seriously questioned. Although the rule is laid down by Mr. *Powell* in his *Treatise on Mortgages*, in the edition of this valuable book published in 1822, Mr. *Coventry*, the learned editor, seriously cautions the reader against it, which he would hardly have done had it been generally approved of and recognised by conveyancers. He suggests that the first mortgagee, in respect of advances made after notice of a second mortgage having no legal right, is not entitled to preference. The weight to be given to his opinion can hardly be diminished by the modesty with which it is expressed.

In *Blunden v. Desart (o)*, Lord Chancellor *Sugden*, in *Ireland*, when treating this subject, is reported to have

(o) 2 Dru. & War. 405, 431.



when asked for a farther loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security. The benefit of the first mortgage is only lessened by the amount of any interest which the mortgagor afterwards conveys to another, consistent with the rights of the first mortgagee. Thus far the mortgagor is entitled to do what he pleases with his own. The consequence certainly is, that after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of *puisne* incumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he chooses voluntarily to make farther advances to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee in making the advances, with notice of the first mortgage; for, by the hypothesis, each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse farther advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider (as they do as often as they discount a bill of exchange), what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss.

A mistaken notion had got abroad that *Gordon v.*

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to be divided among the many unsecured creditors of *Mare*.

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Mr. *Lloyd*, who ably argued for the Appellants, seemed to me to feel, and almost to admit, that at present there is no sufficient evidence to prove the alleged agreement that the effect of the first mortgage, in giving the bank a continuing preferable charge for all future advances to *Mare*, should never be impaired. He excuses this penury of evidence by the frame of the Plaintiff's bill, which seeks relief to the Plaintiff as a surety to the bank for *Mare*; but, as it likewise pointedly claims priority by virtue of the second mortgage, it was clearly incumbent on the Defendants, who denied this claim, and disavowed all notice of the second mortgage, if there had been any such agreement, as is now suggested, to vary the effect of the deeds, to allege it in their answer, and to adduce evidence to prove it before the hearing of the cause. This agreement was not even hinted at before the *Master of the Rolls*; and although the contention of the Plaintiff's counsel before the *Lord Chancellor*, that the two mortgages might be treated as *one transaction*, may have some reference to it, no application was made to the *Lord Chancellor*, any more than to the *Master of the Rolls*, to direct an inquiry upon this subject. The prayer for such an inquiry on the hearing of an appeal from the *Lord Chancellor* to the House of Lords comes too late, and if yielded to would be a precedent for introducing a most inconvenient practice. I should have looked with great jealousy on any evidence to establish a parol agreement or implied understanding to vary the effect of the deeds; but no such evidence has hitherto been, or can now be, adduced.

The Appellants, as to 11,000 *l.*, find themselves in the same position as the unsecured creditors of *Mare*,



entitled to the priority he claims are distinctly stated in the bill; and I can make no doubt that this question, upon which I have expressed my opinion, is properly raised and brought before us by this appeal.

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Upon the whole, my Lords, I think that the *Master of the Rolls* and Lord Chancellor *Chelmsford* took the correct view of this case, and that the appeal should be dismissed.

Lord *Cranworth* :

My Lords, this is a case which, affecting as it does in principle the securities ordinarily given to bankers to cover current accounts, is of great importance.

Two points were made by the Appellant in the argument at the bar. *First*, it was said that the Appellants as first mortgagees by virtue of a mortgage for securing to them future as well as present advances, had, on the general rule of equity, priority over the Respondent, the second mortgagee, for the amount of the balance due to them from *Mare*, the mortgagor, when he became bankrupt. And *secondly*, even if that would not be their right as a general abstract proposition of law, yet that the circumstances of this case would give them the priority for which they contend.

On the second point I may say at once, that I cannot go along with the Appellants; I do not see sufficient to justify me in holding that their case is exceptional—that there are any circumstances taking it out of the general rule, whatever that rule may be.

The question, therefore, to be considered is, what is the general rule or law of the court as to the priority of two incumbrancers standing in the position of these parties; *id est*, of a first mortgagee holding a mortgage to secure a present debt and future advances not exceeding



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rate, your Lordships thought it right to call for the Registrar's Book. My Lords, having examined the entry there attentively, I cannot discover any substantial inaccuracy in the printed report. The report is not accurate in saying that the question was, on what terms the second mortgagee should redeem the first, but the principle involved is the same. There was no question of redemption, because the estate was by consent to be sold; and then the question was, as to the right of the second mortgagee to the purchase money.

My noble and learned friend has stated so fully the proceedings in that case as they are to be collected from the Registrar's Book, that I shall not trouble your Lordships by again alluding to them. He considers that the printed report is probably erroneous in stating that the advance made by the first mortgagee, after the date of the second mortgage, was so made with notice of that second mortgage. And it is certainly true, that the answers both of the first and of the second mortgagee, as set out in the Registrar's Book, are silent on the point of notice. But the entries of these answers are very meagre, and the absence of any allusion by the first mortgagee to the subject of notice leads me irresistibly to the inference that he must have had notice; for if he could have said that his subsequent advances were made without notice of the second mortgage, that would have put an end to all question.

The right of a first mortgagee to tack subsequent advances made without notice, so as to exclude an intermediate mortgagee, was fully established long before the year 1716, when the case of *Gordon v. Graham* was decided. So far back as the year 1669 the case of *Marsh v. Lee(s)* had established the right of a third

(s) 2 Vent. 337 ; 1 Chan. Cas. 162.



edition of Mr. *Powell's* work, published in 1822, states, that the principle of the case of *Gordon v. Graham* was in some degree questionable on the ground that the first mortgagee in respect of advances made after notice of the second mortgage can have no legal, but only an equitable right; and then the doctrine, *prior tempore potior jure*, might be held to apply. But in this observation he overlooks the fact that the original security was to cover future advances; and the question is, whether such advances, when made, do not attach themselves to the mortgage, so as to put them in the same position as if they had all been made when the mortgage was originally created. It is but fair to Mr. *Coventry* to add, that he concludes his observations by saying, though he has submitted them to the learned reader, he individually places but slender reliance on them. My noble and learned friend says, that the weight to be attributed to Mr. *Coventry's* opinion cannot be diminished by the modesty with which it is stated. But the fair result of the passage cited from his note appears to me not that he stated his own doubt with diffidence, but that he meant to state the doubts of others in which he did not concur.

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Six years after the publication of Mr. *Coventry's* edition of *Powell*, the late Mr. *Jarman* published his edition of *Bythewood's* Conveyancing, and he there states the case of *Gordon v. Graham* at length; and after doing so, he makes the following remarks: (t) "It will be seen that Lord *Cowper* relied upon the circumstance of the second mortgagee having notice of the first mortgage; and though the reasons before suggested in favour of the priority of the first mortgagee might seem to apply as well to cases in

(t) 5 Jarman's *Bythewood*, 427, n. (c), 5 Sweet's Jarman, 443.



they intended to postpone the future advances of the first mortgagee to those under the second mortgage, effect will be given to that intention. I have adverted to this sort of special case, because it fully explains what Lord Chancellor *Sugden* is reported to have said in Ireland, when the case of *Gordon v. Graham* had been cited in argument. In *Blunden v. Desart* (u) that very learned judge is reported to have said “even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves farther consideration whether it would be safe to rely in all cases upon *Gordon v. Graham*, as an authority that advances may be safely made after the first mortgagee has had notice of a second mortgage.” It was assumed at the bar that his Lordship had cast a doubt on the authority of the case in question by what he then said. On the contrary, his Lordship appears to me to consider it to be in general a correct exponent of the law, and merely to guard against the supposition that it is necessarily applicable to all cases.

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In the year 1843, a case came before Lord Justice *Knight Bruce*, then Vice Chancellor, which, though it did not raise the precise question, seems to give much countenance to the doctrine of Lord *Cowper*. I allude to the case of *Johnson v. Bourne* (v). There *Hugh Gore*, being engaged in building speculations, and being indebted to the *Liverpool* Banking Company in a sum of 2,167 l., executed to the bank a mortgage of land, on which were three unfinished houses, to secure what was then due from him, or should thereafter become due, provided that the principal monies recoverable by the security should not exceed 5,800 l. In *November* 1837, one of the houses was completed. It was sold for a sum of 1850 l., and

(u) 2 Dru. & War. 405, 431. (v) 2 You. & Col. Ch. Cas. 268.



them must have been made during the years 1838 and 1839, and up to *March* 1840, when the last house was completed; and if the doctrine on which the decree now under consideration rests is well founded, it would in all probability have been unnecessary for him to rest his title to relief on the ground on which he put it, namely, that the sums received on the sales were to be taken *pro tanto* in discharge of the principal sums secured to the first mortgagee. This case affords strong evidence of what was the general understanding of the profession.

I do not find that the doctrine of Lord *Cowper* had again been alluded to in any reported case till the year 1855, when it certainly seems to have been doubted by a very high authority, the present *Master of the Rolls*. In the case of *Shaw v. Neale* (*w*), his Honor is reported to have said that the decision in *Gordon v. Graham* had not met with the unanimous approbation of the profession. But for this he refers to no authority except the treatise of Mr. *Powell* and the dictum of Lord Chancellor *Sugden* in *Blunden v. Desart*, which I have quoted. His Honor was clearly wrong in supposing that Mr. *Powell* had intimated any doubt on the subject, though such a doubt was suggested by Mr. *Coventry*; and Lord Chancellor *Sugden* does not, as it appears to me, by what he said in *Blunden v. Desart*, express any doubt of the general soundness of the doctrine, though his Lordship stated most truly, that the rule must not be taken as one which will necessarily govern all cases. It is true that when, in the argument of the case of *Shaw v. Neale* on appeal in this House, the case of *Gordon v. Graham* was referred to, Lord *St. Leonards* said (*x*), that if Lord *Cowper* had in the end maintained the opinion he was first supposed to express, he could not

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(*w*) 20 Beav. 181.

(*x*) 6 H. L. Cas. 581, 597.



Lord *Chelmsford*:

My Lords, I adhere to the judgment which I pronounced upon this case in the Court below. But as my noble and learned friend (Lord *Cranworth*) whose opinion is always entitled to the greatest respect, does not agree in the propriety of my decree, I must trespass upon your Lordships' attention with a few additional reasons in support of it; however unnecessary this may appear after it has been sanctioned by the authority of my noble and learned friend the *Lord Chancellor*.

Your Lordships have had the advantage of being informed of every thing which can be ascertained respecting the case of *Gordon v. Graham*, so as to enable you to determine whether the meagre reports of it are likely to be accurate, and whether the doctrine attributed to Lord *Cowper* was necessary to found the decree which he pronounced. I expressed myself perhaps a little too strongly in the Court below as to the doubts which had been thrown upon that case. I was led to the remarks which I made, by the opinions of Mr. *Coventry* in his edition of *Powell* on Mortgages, and of Mr. *Fisher* in his excellent treatise on the same subject (y); also by the observations of the *Master of the Rolls* in the case of *Shaw v. Neale*, and of my noble and learned friend Lord *St. Leonards* in *Blunden v. Desart* (which I understand as at least implying disapprobation of the doctrine to the unqualified extent in which it is stated in the report), and also from what I gathered to be the inclination of my noble and learned friend's opinion from the incidental remark which he made in the course of the argument of the case of *Shaw v. Neale* in this House.

But whether my reflections upon *Gordon v. Graham*

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course, repeat the facts so fully stated by him, but will merely offer a few suggestions as to the conclusions which appear to me to be deducible from them.

The equitable charge for the 900*l.* to *Montgomery* existed at the time of the assignment of the mortgage to *Turner*. But that assignment gave *Turner* the legal estate, and a security for his present debt, and also for any advances which he might subsequently make to the extent of 1,800*l.* It nowhere appears whether *Turner* had notice of *Montgomery's* equitable charge, but the legal estate which he obtained by the assignment, would give him priority within the limits of the mortgage security. And no doubt appears to have been entertained that *Turner* was to be first paid all his advances prior to the deed of 1713. The decree was made upon hearing the deed of assignment of the mortgage to *Turner*, and the deed of the 25th August 1713. By this latter deed the premises were to be sold, and the money arising from the sale was to be applied in payment first of what was due to *Turner*, and then of the 900*l.* due to *Montgomery*. The question of notice was only applicable to this deed, and it is to the advances made after it, that the part of the decree directing the inquiry refers. It must I think, be assumed that *Turner* had notice of this deed, not only from the admission (however qualified) made by him in his answer, but also because there would otherwise have been no reason for the *Master* being required by the decree to state specially his finding of any monies advanced by *Turner* on the credit of the mortgage after the 25th August 1713.

There is some inaccuracy in the language of the decree in first ordering that *Turner* should be paid his debt, and then directing an inquiry as to advances made after the deed of 1713. This inquiry would have been wholly

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may tend to show the propriety of it in every respect, but, at the same time, renders it difficult to understand how the case could have presented any opening for the general proposition, reported to have been laid down by Lord *Cowper*, on terms clearly inapplicable to the facts upon which his decision proceeded. I do not feel restrained, therefore, by the deference which is justly due to Lord *Cowper*'s high authority from questioning freely the doctrine which he is supposed to have sanctioned. The reason upon which the doctrine proceeds is, "that it was the folly of the second mortgagee with notice to take such security." Now, what is this but to say that a mortgagee, by taking a security for advances which may never be made, may effectually preclude a mortgagor from afterwards raising money in any other quarter? And, as the first mortgagee is not bound to make the stipulated farther advances, and with notice of a subsequent mortgage, he can always protect himself by inquiries as to the state of the accounts with the second mortgagee, if he chooses to run the risk of advancing his money with the knowledge, or the means of knowledge, of his position, what reason can there be for allowing him any priority? What injustice is done to him by postponing him to the second mortgagee under such circumstances? But, on the other hand, if it is to be held that he is always to be secure of his priority, a perpetual curb is imposed on the mortgagor's right to encumber his equity of redemption.

Difficulties were raised in argument as to the mode in which the alternating priorities between the respective mortgagees might have to be adjusted. But the simple answer to these suggestions is, that the advances must have priority according to the order in which they are made. No difficulty of this kind, however, arises in the

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taking of *Mare* that *Rolt* would repay that sum on the following morning. All the facts connected with these transactions appear to be strongly opposed to the notion that *Rolt* intended to waive his claim to priority over these advances by the bank. The Appellants can succeed only upon the ground supposed to be established by *Gordon v. Graham*, that their prior mortgage secured to them a continuing priority available against a second mortgagee under all circumstances, except an agreement by them to waive their right.

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A full examination of the case relied upon has shown that the proposition cannot be maintained upon the ground of authority, nor can it, in my opinion, be supported upon any sound principle. And I therefore agree with the *Lord Chancellor*, that the decree ought to be affirmed.

*The Lord Chancellor*: I presume that as there is a difference of opinion among your Lordships, the decree will be affirmed without costs.

*Lord Cranworth*: With all deference I do not think that is a correct principle. This case was first decided by the *Master of the Rolls*. It was then brought before the *Lord Chancellor*, and the decision affirmed; and I do not think that as a general rule it is correct to say that the Appellant ought not to pay the costs, merely because your Lordships are not unanimous in thinking that both the courts below were right in their judgments.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 30 *May* 1861.



IN this case the Plaintiff brought an action against the two companies to recover the value of the contents of a case containing watches, which had been stolen while being carried from *Belfast* to *Londonderry*. The whole line of railway was occupied, but not conjointly, by the two companies; and the Plaintiff had taken, at *Belfast*, a through ticket for the whole journey. The action was in form, therefore, against both. A private individual had originally been made a Defendant with the two Companies; but, as it was clear that in fact he had no interest in the matter, a verdict was at once taken for him.

The Declaration or Plaint (which according to the practice in *Ireland*, was divided into Paragraphs instead of Counts) stated that the Defendants at the time of committing the grievances, &c., were common carriers upon certain railways in *Ireland*, to wit, &c. That the Plaintiff, at the request of the Defendants, on, &c., became a second-class passenger on the said Railways, to be carried from *Belfast* to *Londonderry*, upon a through ticket, for money, to wit, &c., paid by him to the Defendants in that behalf: that one *Thomas Connolly* was a servant upon, and the guard of the Railway train by which Defendants were conveying the Plaintiff, and by which the Plaintiff was so travelling, &c.; and that he, acting as such guard, requested of the Plaintiff to deliver to him, *Connolly*, as such guard, a certain travelling case of the Plaintiff, which the Plaintiff was carrying with him upon the said journey, in order that the same might be carried in a certain compartment in the said train appropriated to the conveyance of luggage and goods. And the Plaintiff, in compliance with the requisition of *Connolly*, so acting as such guard, delivered to *Connolly* the said travelling case, to wit, of the value of 5*l.*, containing goods and chattels of the Plaintiff, that is to say (speci-

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the gross neglect and default of Defendants, the travelling case and watches have never been re-delivered to Plaintiff, whereby he has sustained damage to 1,895*l*. And the Plaintiff says that he was compelled to travel divers journeys, and to incur divers costs and expenses, and did travel said journeys and incur said costs in seeking from Defendants a re-delivery of the case and watches, and in endeavouring to regain and recover his said property, which costs, &c., amount to 40*l*. of special damage sustained by said Plaintiff, in addition to the said sum of 1,895*l*.

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The pleadings were very voluminous, but all that it is now necessary to notice were the following:

The two companies separated in their defences. The *Belfast* Company pleaded first, that Defendants were not common carriers; second, that the Plaintiff did not deliver the case, &c., nor did Defendants receive the case to be safely carried as alleged; third, that Defendants were not guilty of neglect; twelfth, that Defendants were common carriers on certain railways of passengers for certain fares, and of goods at certain rates; that passengers were entitled to carry with them their personal luggage free, but were not entitled to carry with them merchandise without paying for the same as such, of which Plaintiff had notice; that Plaintiff was a passenger and took the case with him as personal luggage without paying for the same; that the case and contents constituted merchandise of which Plaintiff had notice, but of which Defendants had not notice. Thirteenth, that the case and contents were delivered to Defendants, being common carriers by land for hire subsequently to the passing of the 1 Will. 4, c. 64; that the case contained watches of a value exceeding 10*l*. within the statute; that at the time of the delivery of the case Defendants had



thirteenth defences of the *Belfast* Company, and the third defence of the *Londonderry* Company, and as to so much of the defences as alleged want of notice, the Plaintiff replied that the case was in appearance, and in fact, fit and proper for the conveyance of merchandise, and not personal luggage, and that there was no improper concealment on his part, yet the Defendants received the case without objection and without demanding extra remuneration, and without making any inquiry touching the nature of the contents.

The Defendants as to the sixth replication rejoined, denying the felonious stealing; and as to the seventh, demurred for not alleging notice of the contents of the case; and rejoined that there was improper concealment.

The Court, according to the provisions of "The Common Law Procedure Act, *Ireland*, 1853," settled the issues for trial. Of these it is only necessary to mention the fifth and thirteenth: "Fifth, whether the said case was in appearance and fact fit and proper for, and manifestly did contain merchandise, as in the last replication alleged." "Thirteenth, whether the Defendants, or any, and which of them, were guilty of gross negligence, as in the plaint alleged." The cause was tried before Chief Justice *Mona-han*, and as to the fifth issue the jurors found "that the case was in appearance and fact fit and proper for, and did contain merchandise, but that the particular sort of merchandise which it so contained did not manifestly appear, but that they now found that the said case did contain watches." "Thirteenth, that the Defendants were not guilty of gross negligence." A *nolle prosequi* was, by order of the Court, entered as to the third and fifth paragraphs of the plaint which charged negligence. Judgment was given for the Plaintiff in *December* 1858 (a). The case was taken to the Exchequer Chamber, where six Judges

(a) 8 Ir. Com. Law Rep., N. S., 167.

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heard it argued, and they being element stood affirmed (*b*). The point was then brought.

The Judges were summoned, Pollock, Mr. Justice Wightman, Mr. Baron Channell, Mr. Justice Blackburn attended.

Mr. Bovill and Mr. Joseph in Error.

There is nothing here to show bailment of this case and the companies are only liable for gross negligence (*c*), *Dansey v. Richardson* expressly negatived by the finding in *Jones on Bailments (e)*, who who spontaneously and officiously carry the goods of another, though answer for slight neglect," can be opposed to what he has before by *Story (f)*. And in *Finca* down, that even a bailee for a time take the same care of another's goods therefore when they are stolen he is liable unless he has been guilty of some fault. The same doctrine is to be found in *and Dansey v. Richardson (i)*. As to the part of the Defendants merged they are only liable, if at all, on that contract was to carry passengers.

(*b*) 11 Ir. Com. Law Rep., N. S., 145.

(*c*) 2 Ad. & El. 256.

(*d*) 3 El. & Bl. 144.

(*e*) p. 121.



and merchandise on other terms. It is true that each passenger is entitled to carry a certain amount of luggage, but he is not entitled to carry merchandise as luggage, but is bound to pay specially for it as merchandise. That is a condition of any contract into which the companies enter to carry merchandise, and if that condition is not complied with, they are not bound. *Cahill v. The North Western Company* (j), *Wilton v. The Atlantic Royal Mail Steam Packet Company* (k). Even the manifest appearance of a box showing that it contains merchandise gives no notice of the sort of merchandise. [Lord *Chelmsford*: But does not that make the case of *Walker v. Jackson* (l) applicable?] No, for there the Defendant undertook to carry light carriages with horses across the ferry, and made no stipulation whatever as to what was put into the carriage. The allegation of the appearance of the case amounts to an admission on the record, that Defendants had no notice that the merchandise consisted of watches. If a carrier's contract is to be treated as a contract of insurance, which is really sought to be done in this case, there must be *uberrima fides* on the part of the person making it. That has not been so here. Had the Defendants been informed that the case did not contain personal luggage but valuable merchandise, they would not have taken it except on the terms of special payment for the carriage.

It is true that had they then thought fit to take it on the charge only of the ordinary passenger fare, they would have been liable, as stated by Mr. Baron *Parke* in the *Great Northern Railway Company v. Shepherd* (m); but the decision in that case shows, that the Defendants having no knowledge of the kind, cannot be made respon-

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(j) 10 Com. Ben. Rep., N.S.,  
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(k) Id. 453.

(l) 10 Mee. & Wels. 161.

(m) 8 Exch. Rep. 30.



ney. That is expressly alleged in the paragraph. They were not re-delivered; that alone will make the Defendants liable, and the allegation of the fact is, in the first paragraph, sufficient for that purpose.

The defence that the Plaintiff's case contained merchandise and not luggage, is no answer to the action. It is not deny the liability to re-deliver, and the Plaintiff would have recovered *in detinue*. Whether luggage or not, though the Defendants allowed him to take it into his personal charge, they were still responsible for its safety. Lord *Wensleydale*: But there is no contract with the Plaintiff to carry a package at all. It is only a contract to carry the man]. Yes, with his luggage; and the case was treated as luggage. [Lord *Wensleydale*: In the course of the journey he gave up this case to be taken care of by the guard.] The guard required him to give it up to put into the luggage van. That was claiming to treat as something not personal luggage; yet with this knowledge that it was so, no higher or different payment was demanded for it. [Lord *Chelmsford*: Does not that actual taking possession of it make a new contract for part of the journey?]

*The Great Northern Railway Company v. Shepherd*(q), there, after a collision, the goods, which were no more personal luggage than they were here, were taken actual possession of by the company's servants, but the company was held liable as upon the first contract. The Plaintiff has a right to connect the act of the guard in the middle of the journey with the previous acts of the Defendants at its commencement, and to say that they undertook to carry all, man and goods. [Lord *Brougham*: you put the duty of the company to take luggage of the same sort on the same footing with the duty to take the passenger with his clothes?] Putting the paragraph and the facts together, that is so. There is nothing to show

(q) 8 Exch. Rep.30.

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the part of the Defendants, and to bind them by his acts. [Lord *Cranworth*: The notice that the company will not carry merchandise, except on payment for it as such, is an instruction to the servant]. And the act of the servant may be a waiver of that. [Lord *Chelmsford*: Does the act of the servant in saying that it is inconvenient for the case to be kept in the carriage, and that it must be carried elsewhere, make it more than before the possession of the company?] It is, in fact, more under the control of the company. [Lord *Cranworth*: Then your proposition is, that this taking of the goods supplied authority for the finding of the jury, that the Plaintiff was required to deliver and did deliver the case to *Thomas Connolly*, and that we are bound to infer as a conclusion of law, that the guard had authority from the Defendants to contract that it should be safely re-delivered.] Certainly. "The owner trusting him with the goods is sufficient consideration for the careful management of them." *Coggs v. Bernard* (t.) [Lord *Brougham*: Is a contract to take the person an implied contract to take his personal luggage?] It is in the case of a railway, where passengers are by Act of Parliament allowed certain weights of luggage. Besides, the defendants have set forth that in their own defences, and that defence does not relieve them from the liability by alleging that these goods were merchandise and were carried without any charge, for the replication to that is, you took on yourself, of your own accord, to carry this case without making any special charge for it, and so you became responsible for safely carrying it. The defendants having taken this case safely to carry, the Plaintiff is entitled to have it back. [Lord *Wensleydale*: They say that the Plaintiff did not deliver nor did the defendants receive in manner alleged.] The

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of the Defendants, and to recover damages for the non-performance of it. *Richards v. The Brighton Railway Company* (v) shows, that a count like this was held sufficient under circumstances such as exist here; there the duty of the Defendants, as common carriers, was held to continue even until the passengers' luggage was safely placed in the hackney carriage; and *Collett v. The North Western Railway Company* (w) establishes that the duty to carry, even when imposed as a matter of regulation, implies the duty to carry safely. [Lord Brougham: There is no authority necessary to establish that. Lord Cranworth: To what do you refer the words "pursuant to their contract in this behalf"?] To the delivery of the luggage on demand. [Lord Chelmsford: There is only one contract stated, which is to carry. Even after verdict, must not the contract found be referred to the contract which is expressly stated on the paragraph?] [Lord Wensleydale: These difficulties would not have happened if the parties had been left to frame the issues themselves.] Probably not.

[The Lord Chancellor: My servant receives orders from me not to accept goods under certain circumstances. You know that; yet you deliver goods under those circumstances. Can you then say that I have received these goods through his agency?]

The receipt of the goods is admitted by these Defendants on the pleadings, so that that question does not arise. The proof that they still have the goods is found in the fact that after this admitted receipt of the goods the Defendants did not re-deliver them. It is not necessary to show gross neglect on the part of the carrier, for if the articles are delivered in good faith, the carrier is liable for all causes of loss unless arising from the act

(v) 7 Com. Ben. Rep. 839.

(w) 16 Q. B. Rep. 984.



attempt to extract from the pleadings the questions in detail, but I think it will be more convenient for the Judges, and will lead to less embarrassment and difficulty, if the question to be submitted to them is in a form nearly correspondent to the manner in which the case was raised and argued before the Court of Queen's Bench and the Court of Error below, which I think will be the best done by putting it in the following general form: "Whether, regard being had to the pleadings, and to the findings of the jury on the issues, and the *nolle prosequi* entered by the Plaintiff, judgment ought to be entered for the Plaintiff in the action, or for the Defendants?"

I particularly submit to your Lordships the propriety of introducing a reference to the *nolle prosequi*, because, as has been just stated, the issues having been settled and tried before the record was cleared of superfluous matter by the entry of the *nolle prosequi*, it may be a question for consideration whether some of the findings of the jury were not applicable to the issues raised upon portions of the record which, by the operation of the *nolle prosequi*, are not now before your Lordships.

The *Lord Chief Baron*, in the name of the Judges, requested leave for them to retire to consider the question. They did so; and on their return his Lordship said:

My Lords, I am desired by my learned brothers to state to your Lordships that we are all of opinion that judgment ought to be entered for the Defendants below. We are inclined to think that the first paragraph of the plaint may be understood in a sense which may make it good. But if so, the 12th plea answers it in that sense, and then we think the replication bad for not averring (even argumentatively), that the Defendants had notice or know-

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company were bound to obey it; and he could not at all in reason, or in justice, found himself upon any liability of the company contracted by an act done by a servant of the company in direct contravention of the rule laid down by the company for the guidance of its servants. In substance, therefore, it comes to this; that the Plaintiff intended to have the goods carried in the carriage with him, and thus to escape the obligation of paying for their carriage as merchandise; and under these circumstances there could not exist, in law or in reason, any contract whatever between the Plaintiff and the company touching those goods, upon the breach or in default of the performance of which contract the Plaintiff could have a right against the company. The Plaintiff ought to know that there can be but one opinion entertained upon the merits and substance of the case.

Then, my Lords, when we come to the form of the pleadings, I most entirely agree in the opinion that we have heard from the learned Judges. I think, however, that it might admit of very considerable doubt whether there was or was not in the first paragraph of the summons any valid contract alleged. But acceding to the full extent to the opinion of the learned Judges, that it is possible that that paragraph might be so construed as to create a valid contract, it is perfectly clear that the merits and substance of the case, as well as what justice requires, are contained in the twelfth plea of the Defendants, setting forth the rule of the company, and the Plaintiff's knowledge of that rule, and that there was no contract between them and him, except to carry his personal luggage; and that with respect to this, which he took in the character and under the denomination of personal luggage, he concealed, in fact, what it was from the Defendants. My Lords, there is nothing pleaded by

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My Lords, the transaction, in truth, was this: Defendants, no doubt, received the Plaintiff with his parcel as a passenger, without any notice from him of its contents, supposing it to be luggage. When he had proceeded half way on his route on to another line of railway, an officer of the company, *Connolly*, requested the parcel to be delivered to him. It was accordingly given to him, and it was put by him into one of the vans. Now, the original contract certainly was, that the Plaintiff was not to pay anything for his luggage; it was included in his fare. But he was bound to pay for merchandise, and that acceptance of it by *Connolly* would not create an alteration of that original contract with the company. Anything done by him in the course of the journey from one end to the other could not alter the original contract made by his employers. That, I believe, is the true state of the case, and therefore upon the merits, however pleaded, I should have no doubt that the Plaintiff has not succeeded. I think the plea is a good plea. And if we come to the replication to that plea, it is enough to say that that replication is demurrable for the reasons which have been so ably assigned by Mr. *Brown* on the part of the Defendants. It is unnecessary to add anything farther upon that point.

With respect to the other pleadings, the replication being now held to be insufficient in point of law, there is no necessity to investigate the issues of fact on that replication. So that we need not pronounce any opinion upon them. But as to the fact of the parcel containing watches being put in issue, in any view of the replication, I am strongly inclined to think that the replication is altogether immaterial; and if the replication as a whole is immaterial, you cannot separate and distinguish between the material and immaterial parts. That has been

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JAMES LYNCH - - - - *Plaintiff in Error.*

WILLIAM KNIGHT and JANE }  
KNIGHT, his Wife - - - - } *Defendants in Error.*

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**Q<sub>n</sub>.** whether a wife can maintain an action against a third person for words occasioning to her the loss of the *consortium* of the husband?

**Per Lord Campbell** (Lord Chancellor): She can.

If she can, the words must be such that from them the loss of the *consortium* follows as a natural and reasonable consequence:

*Slander.  
Special  
Damage.  
Husband and  
Wife.  
Pleading.*

Where therefore a wife (her husband being joined for conformity as a Plaintiff) brought an action to recover damages from *A.* for slander uttered by him to her husband, imputing to her that she had been almost seduced by *B.* before her marriage, and that her husband ought not to let *B.* visit at his house, and the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house and return to her father whereby she lost the *consortium* of her husband:

**Held**, that the cause of complaint thus set forth would not sustain the action, for that the alleged ground of special damage did not show (in the conduct of the husband) a natural and reasonable consequence of the slander. *Dub. Lord Wensleydale.*

*Allsop v. Allsop*, 5 Hurl. & Nor. 534, confirmed.

**Per Lord Campbell** (Lord Chancellor); though a case is of first impression, if it shows a concurrence of loss and damage arising from the act complained of, the action will be maintainable.

The loss by the wife of her maintenance by the husband, occasioned by slander uttered by a third person, may be made the subject of a claim for damages, but such loss cannot be presumed to have so arisen: it must be distinctly averred.

*Vicars v. Wilcocks*, 8 East, 1, observed upon.

In such a case, though the act of the husband in sending away his wife was wrongful, because the slander was false, the fact that it was false, cannot be taken advantage of by the slanderer as an objection to the husband appearing on the record as a Plaintiff.

Observations on the unsatisfactory state of the law with regard to slanders on women.

IN this case an action had been brought in the Court of Queen's Bench in Ireland, in the names of *Knight* and his wife (the former being joined for conformity), to recover damages for slanderous words spoken of the wife.



and disgrace by future immoral or improper conduct on her part."

The second paragraph set forth the following words:

"He threatened to shoot me. I told him of his wife's misconduct. It was all owing to his wife. She had been insinuating to him that he had seduced her. She is a horrid young villain, and a notorious liar. Her brother, *one Thomas Jones*, is also a liar, but his lies are of the most harmless kind, whereas hers are of the most dangerous. In fact, she is such a dangerous character to have in the house, that I was obliged to have the back door in the yard nailed up."

Innuendo: "That the Defendant thereby meant to impute to the Plaintiff *Jane* that she had been guilty of immorality as aforesaid with the said Dr. *Casserly*, and that for the purpose of trying to conceal her said guilty conduct, she falsely represented to her husband that the Defendant himself had tried to seduce her, and had, in fact, seduced her; and also that the Defendant meant thereby to impute to the Plaintiff *Jane* that she was a woman of the most abandoned habits and character, and that she was capable of inventing any story to suit her own purposes, and that, in fact, it was unsafe for the Defendant to have her living in his house from her conduct and character, and that Defendant had, in fact, been obliged to adopt precautions to prevent her having access to a portion of his premises, lest she might commit some crime therein."

The averment of special damages was in these terms:

"And the Plaintiffs aver that from the said false, scandalous, and malicious statements of the Defendant, the Plaintiff *William* was at first led to believe, and that he did in fact believe that his wife, the Plaintiff *Jane*, had been guilty of improper and immoral conduct before her

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The issues settled by the Court were, first, whether the Defendant spoke the words; secondly, whether they were spoken in the defamatory sense mentioned in the two paragraphs of the plaint.

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The jury found a verdict for the Plaintiffs, damages £50*l*. The Court of Queen's Bench having overruled the demurrer, judgment was given for the Plaintiffs on this finding. The case was then taken on Error to the Exchequer Chamber, where the judges were divided in opinion, but the judgment was affirmed. The present proceeding in Error was then brought.

Mr. *Bovill* and Mr. *Quain* for the Plaintiffs in Error.

There is no precedent for such an action as this to be found in any of the books. It is not pretended that this action was maintainable without special damage. If so, that damage must be a consequence arising naturally and necessarily from the words spoken. The husband turning the wife out of doors is not such a consequence for he says the words are false. [The Lord Chancellor (Lord *Campbell*): It would be a natural consequence in a certain rank of life; the Defendant cannot say that what he stated was not true and ought not to have been believed, for he must have meant it to be believed.] But there is nothing here of that sort of damage which the law has been accustomed to recognise, and under such circumstances new classes of damage ought not to be introduced, *Allsop v. Allsop* (a); and even in *Winsmore v. Greenbank* (b), where the Court would not listen to the objection of the novelty of the action, it was said, "that there must be *new facts* in every special action on the case." There are no new facts here. There have been many actions for slander of the wife, and all

(a) 5 Hurl. & Nor. 534.

(b) *Willes*, 577.



dismissal was not the legal consequence of the statement, the action was held not maintainable. [Lord *Brougham*: The master is not bound to institute an action, to try whether the slander is true; but if not, then the person injured is injured by its being false, and the slanderer being the cause of the injury, is not the action maintainable in respect of that injury?] No. Suppose a man bought a cargo of wheat, and was then told it was bad, and so refused to take the cargo; when he found out that what he had been told was untrue, he could not maintain an action against the slanderer for the loss he had suffered by refusing to take the cargo.

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[The *Lord Chancellor*: It must not be laid down as a universal rule that a man cannot maintain an action if he is induced by false representations to do an act which occasions him damage. The real question is, whether under the circumstances his conduct is reasonable, not simply whether it is wrongful.] Try this case by that rule. A man is bound to protect his wife. It is not reasonable for him to believe imputations uttered in this way against her. Can he maintain an action because he has unreasonably believed them? In *Morris v. Langdale* (*h*), where the words were not in themselves actionable, but it was averred that other persons had thereby been prevented from performing their contracts with the Plaintiff, Lord *Eldon* said that that was damage that might be compensated by actions against those persons, and so would not allow it to be a sufficient averment of damage there. All the cases are collected in *Starkie* on Libel (*i*), where he states that the action for words consists of three varieties, the first of which is where the words are not actionable except in

(*h*) 2 Bos. & Pul. 284.

(*i*) Vol. I. 348.



injury to the wife in consequence of which she has sustained damage. Suppose for a moment that the husband had died in the meantime, could not the wife have maintained this action after his death. If she could, she could maintain it now, for the cause of action is a substantial injury to her and not to him.

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It is said that the damage must be the natural result of the words; correctly stated the proposition would be, must be the natural actual result. It is so here. If the words were true, it is the natural actual result in every sense of that term; and the slanderer cannot be permitted to say that they are not true. He intended that the husband should believe them; the husband did believe them, and he sent his wife back to her father.

[The *Lord Chancellor*: But is there anything here which, if true, would justify the husband in sending her back?]

There is, and the innuendo sufficiently alleges it.

[The *Lord Chancellor*: Yet, for nothing in any way stated on the face of this plaint could he have sued for a divorce, even *a mensa et thoro*. Lord *Wensleydale*. And he had no right at all to turn her away if what was stated was not true.]

But it was a natural and probable result of the words that he should act on them as true. Every man should be taken to be answerable for the consequences of his own acts, *Ward v. Weeks* (m), and therefore, the Defendant must be taken to have foreseen and intended the mischief he caused. The cases of *Saville v. Sweeny*, and *Allsop v. Allsop*, do not touch the present, for in both the damage alleged was a pecuniary damage, falling in point of law entirely on the husband, and in the former, the alleged ground of damage, the loss of the society of friends is



*Chapman v. Pickersgill* (t); and *Lumley v. Gye* (u) was itself an instance where that argument was wholly disregarded.

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No doubt the husband himself could not complain of his own wrongful act; but he is necessarily joined for conformity, the wife being the person who has sustained the injury through the act of the Defendant. That matter of form cannot affect her substantive right. Except as to mere form the wife is the only Plaintiff, and the Court must look at the case in respect only of the substantial matter of complaint, and treat it as if the husband was dead. It may, however, be doubtful whether if the words were true, the husband would not be justified in putting away the wife. [The *Lord Chancellor*: Suppose she had brought a suit for restitution of conjugal rights, would the proof of the utterance of these words be a justification to the husband of his conduct?]. After such charges the Court might refuse to order a restitution of conjugal rights. There is a great difference in the proof required in a suit by a husband asking for a separation, and in one by a wife asking for restitution of conjugal rights. There is no process known to the common law by which the husband is compelled to keep his wife. If he refuses to receive her, the only remedy she has is in the Spiritual Court. If that Court would give her relief, still she would have suffered a wrong in the act which compelled her to seek its protection; if it could not give her relief, the injury to her would be all the greater.

The damage here is not too remote. In *Corcoran v. Corcoran* (v), the words complained of were spoken of the wife only; special damage was alleged, namely, that a voluntary promise to confer a benefit on the Plaintiff

(t) 2 Wils. 145.

(u) 2 Ell. & Bl. 216.

(v) 7 Ir. Com. Law Rep.  
(N.S.) 272.



chequer Chamber. I may be permitted to observe, that I have been greatly pleased by the research, the learning, and the talent which they display.

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“ After much consideration, I agree with the two dissenting judges in the Court of Exchequer Chamber. I am far from thinking the opinions of the majority to be entitled to less weight from the difficulty with which they were formed, and the hesitation with which they were pronounced. On the contrary, I regard them on this account still more respectfully.

“ Were it not for one defect in the case of the Plaintiffs, I should have agreed with them, and I think that all the other objections to the action were properly overruled.

“ Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of *loss* and *injury* from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. If the special damage alleged to arise from the speaking of slanderous words, not actionable in themselves, results in pecuniary loss, it is a loss only to the husband; and although it may be the loss of the personal earnings of the wife living separate from her husband, she cannot join in the action. But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognise, to the wife as well as to the husband. The wife is not the servant of the husband, and the action for criminal conversation by the husband does not, like the action by a father for seduction of a daughter, rest on any such fiction as a loss of the services of the wife. The better opinion is that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband who had seduced him. But I conceive



imputation, if true, would have justified the dismissal, the action would not lie, because the imputation was false, and the dismissal was wrongful.

“I am of opinion that in the present case the action is not maintainable, because, looking to the frame of the declaration, the loss or special damage relied upon is not the natural and probable consequence of the injury complained of, viz., the speaking of the slanderous words. It is allowed that the words are not actionable in themselves, and reliance is placed solely on the allegation, ‘that in consequence thereof the husband was induced to refuse, and did, in fact, refuse to live any longer with the Plaintiff *Jane*, his wife, and on the contrary thereof the Plaintiff *William* required the father of the Plaintiff *Jane*, who lived in the country, to take her home to his own house, which he accordingly did; and the Plaintiff *Jane*, in fact, thereupon left *Dublin*, and returned to her father’s house, where she resided for a considerable time separated from her husband.’ Now, assuming that this rather inartificial language amounts to a sufficient allegation that in consequence of the words spoken by the Defendant, the Plaintiff *Jane* had for a time lost the conjugal society of her husband, we must inquire whether this special damage was the natural and probable consequence of the words spoken. Had those words contained a charge of adultery by the wife, which the Defendant pretended to know, and which he asserted as a fact, I should have thought the allegation of special damage sufficient to support the action. In that case the husband, believing the charge to be true, would have been justified in separating from his wife, and this separation would have been the natural and direct and probable consequence of the slander. Although not the necessary consequence, it would not have arisen from any

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“I may lament the unsatisfactory state of our law, according to which the imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her; but I am here only to declare the law; and being of opinion that in this case the special damage relied upon arose, not from the natural and probable effect of the words spoken by the Defendant, but from the precipitation or idiosyncrasy of the Plaintiff *William* dismissing the Plaintiff *Jane* from his house when he was only cautioned not to let her mix in society, I must, with sincere deference for the authority of the majority of the *Irish* judges, advise your Lordships that the judgment be reversed.”

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My Lords, I entirely agree with my late noble and learned friend, in his observations, which I have read, upon this case, with this exception, that I am rather inclined to think (though that has become immaterial) that the action does not lie. The words here are not such as would in an ordinary case, and with ordinary persons, naturally produce the effect which they appear to have produced in this case. That is the ground upon which I would hold that the judgment of the Court below is wrong. The words did not impute to the wife actual criminality before marriage. My late noble and learned friend seems to have thought that if they had imputed actual criminality before marriage the parties would stand in a different position. I rather doubt that; but, however, it becomes quite unnecessary to decide that, because the words do not impute actual criminality, and therefore we need not now consider what would be the effect of words of that kind. Here the words are only that she had shown herself false and deceptive, and that before mar-



actionable in themselves, but occasioning special damage to her by depriving her of the *Consortium*, or conjugal society of her husband, the husband and wife may maintain an action against the slanderer; and secondly, that supposing such an action to be maintainable, the words spoken in this case were such as might naturally occasion the wife to lose the *Consortium* or society of her husband.

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My late deceased noble and learned friend, the late *Lord Chancellor*, I know, entertained a strong opinion on the first point in favour of the right of action. He thought that the consequential damage arising to the wife in such a case afforded her a good ground of action; that the right of action on that ground was not confined to the husband.

In the view which I take of this case, I do not feel called on to express a decided opinion on this point. I believe your Lordships are not all agreed on it, and I will therefore only say that I am strongly inclined to think that the view taken by my late noble friend was correct.

But the ground on which I am prepared to advise your Lordships to reverse the judgment below is, that even supposing such an action would lie, still this action is not maintainable.

The special damage, in order to afford a foundation for such an action, must appear to be the natural, I do not say the necessary, consequence of the words spoken; and in this case, I cannot come to the conclusion that the conduct pursued by the husband was that which was, or which the slanderer could have supposed likely to be, the consequence of his slander. The words uttered do not, it must be observed, impute to the wife actual criminality before marriage, but only that she had shown



Lord *Wensleydale*:

My Lords, since the argument at your Lordships' bar, we have been furnished with copies of all the judgments delivered in the Queen's Bench, and in the Court of Error in *Ireland*, in which the case is argued on both sides with very great ability, and every authority, I believe, bearing on the questions, cited. With the great additional aid derived from these judgments, I have given those questions every consideration in my power, and, not without considerable difficulty and doubt, have come to the conclusion that the judgment of the Court of Error ought to be reversed, and judgment given for the Plaintiff in Error.

The questions in the case are two:—1st. Whether a wife can maintain an action for the loss of the *consortium* of the husband by a wrongful act of the Defendant (joining, of course, her husband for conformity)? and 2d. Whether the loss of that *consortium* is sufficiently connected with and shown to be the consequence of the Defendant's wrongful act in this case, so as to be actionable?

There is a considerable doubt upon both these questions, but particularly on the first. I have made up my mind that no such action will lie.

To test this, suppose an action brought by the wife for false imprisonment of the husband by the Defendant, for a period of time, by which she lost the *consortium* of the husband during that time. Would such action lie? If it would not, *à fortiori*, no action could be maintained for slander attended with the special damage of the loss of the husband's society, caused immediately by his own act.

It is certainly an objection of the greatest weight to



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such an action that there is no precedent or authority of any kind in favour of it.

It is contended that it may be supported by analogy to the action which the husband may unquestionably maintain for an injury to the wife *per quod consortium amittit*.

I agree with Baron *Fitzgerald*, that the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of the husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with the position in society of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends.

Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose service is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honour and wounded feelings of the parent.



The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply; and it cannot be presumed that the wrongful act complained of puts an end to the means of that support without an averment to that effect.

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And if there were such an averment, the recovery of a compensation must be by joining the husband in the suit, who himself must receive the money, which would not advance the wife's remedy. The wife is, in fact, without redress by any form of action for an injury to her pecuniary interests.

That the loss of the comfort of the society and attention of friends by a wrongful act does not support an action for slander is fully settled by the case of *Moore v. Meagher* (y); and the wife can have no right of action for a loss of the same character, though of a much higher degree, for the loss of that of her husband. To the same effect is the case of *Medhurst v. Balams* (z).

For these reasons, I think the wife has no remedy in the supposed case of the wrongful imprisonment of the husband; and by parity of reasoning, she can have none for being deprived of the society of her husband by the slander of another upon her character, causing him to desert her, especially when we consider that the damage in this case is immediately caused by the husband's own voluntary act.

This view of the case makes it unnecessary to consider whether the slander of the Defendant has been proved to

(y) 1 Taunt. 39.

(z) Cited in 1 Siderf. 397.



might be given for an act occurring as a consequence of an accusation of that crime.

I think the judgment of the Court of Exchequer Chamber should be reversed.

Judgment reversed.

Lords' Journals, 17th July 1861.

1861.  
LYNCH  
v.  
KNIGHT  
and Wife.

EDWARD P. CLARKE and Others - - - *Appellants.*  
HANNAH COLLS and J. MITCHELL - - - *Respondents.*

1861.  
April 29, 30.  
July 17.  
Settlement.  
"Unmarried."  
Next of Kin.

"Unmarried" is a word of flexible meaning, to be construed with reference to the plain intention of the instrument where it is used. A marriage settlement gave a fund to trustees for *M. F.* (the intended wife) for life, and after her decease, as to one moiety for the husband, and as to the other moiety for the children, at such ages, &c., as the wife, notwithstanding her coverture, should appoint, and in default of appointment, among the children, as tenants in common, to be vested at twenty-one or marriage; and if there should be no child, as to the whole, for the husband for life; and after his decease for any person the wife, notwithstanding her intended or any future coverture, might appoint; and in default of appointment, "for the person or persons, who at the decease of *M. F.*, should be of her blood and in kin to her, and who, in their own right, or in right of their representatives, would have been entitled to the same under the Statutes for Distribution, in case the said *M. F.* had died possessed thereof *intestate and unmarried.*" The wife died with her first child, which survived her only one day. She had not exercised the power of appointment: **Held**, that "unmarried" in this settlement meant being without a husband at the time of death, that consequently the fund went to the child, as the wife's next of kin, and on its death passed to its father.

THIS was an appeal from a decree of Vice-Chancellor *Wood* upon the construction of a marriage settlement made on the 28th of *December* 1816. The settlement was made



There were, then, various other provisions in the settlement, and there was this proviso at the end, “ That in the event of the death of the said *Thomas Cooper Colls* in the lifetime of the said *Mary Foulsham* without his having any issue of the said intended marriage then born, or then *en ventre sa mère*, and afterwards born alive, or leaving such issue, and he, she, or they should all die before his, her, or their share or shares of and in the said trust moneys, stocks, funds, and securities should become absolutely vested under the trusts aforesaid, it should be lawful to and for the said *Mary Foulsham*, notwithstanding any future coverture she might then be under, by any deed or writing under her hand and seal, or under her hand only, to be executed by her in the presence of, and attested by two or more credible witnesses, absolutely to revoke, determine, and make void all and every the trusts, ends, intents, and purposes, powers, provisions, declarations, and agreements hereinbefore declared and contained of and concerning the said sum of 4,000 *l.*, and the stocks, funds, and securities wherein or whereon the same might be invested, and in lieu or stead thereof, by the same or any other deed or writing to be executed as aforesaid, to appoint, direct, and declare any new or other trust, powers, and provisos whatsoever of and concerning the said sum of 4,000 *l.*” The intended marriage took place, and Mrs. *Colls* died on the 30th September 1818, in giving birth to her first child, which was born alive but died the next day. She left her sister, *Elizabeth Foulsham*, and her brother of the half-blood, *William Buckle*, her surviving. *William Buckle* died in 1840, having by his will appointed his sister, *Elizabeth Foulsham*, his sole legatee, and executrix of his will. *Elizabeth Foulsham* died in December 1857,

1861.  
 ———  
 CLARKE  
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Mr. *Rolt* and Mr. *A. Hobhouse*, for the Appellants :

The proper meaning of the word “unmarried” is ‘never having been married.’ In *Re Thistlethwaite’s Trusts* (b), *Maberly v. Strode* (c), *Bell v. Phyn* (d), where the words were “without being married,” and they were construed “without ever having been married.” Thus, when it is said, a man has unmarried daughters, every one understands that he has daughters who have never been married, and that was the meaning of the phrase adopted in *Hall v. Robertson* (e). Such was its meaning in this settlement, as the context itself shows. It will be argued that this could not be its meaning, because there might then be circumstances in which the children of a second marriage of *Mary Foulsham*, had she survived her first husband, might be left without any provision, and the property would go to her next of kin. But that argument, which is one of inconvenience alone, is answered by the existence of the power vested in her after the death of her first husband, to appoint the fund: a power which of course she would have exercised in favour of her own children had she lived to contract a second marriage. The gift to her next of kin never could arise until a total failure of her issue. Should that event happen, the intention plainly was to retain the property in the wife’s family, and not to allow it to go over to the family of the husband. That intention is clearly shown by the use of the words, “of her own blood,” words which would be both unnecessary and unmeaning except on the construction contended for by the Appellant. The construction put on the settlement by the Court below utterly defeats that object.

The cases which seem to justify that construction are,

(b) 24 Law J. (Ch.) 712.

(c) 3 Ves. 450.

(d) 7 Ves. 453.

(e) 22 Law J. (Ch.) 1054.

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*Hoare v. Barnes* (f), and *Maugham v. Vincent* (g), but in neither of these cases was there any specific provision for the children, and when, therefore, children came into existence, it was reasonable to hold that there could not have been any intention to leave them without a provision, and so they were held entitled. In *Pratt v. Mathew*, (h), *Re Norman's Trusts* (i), *Re Saunders Trusts* (j), and *Day v. Barnard* (k); there was either no provision for the children at all, or none in which they would acquire a vested interest till twenty-one or marriage, and as that might leave issue unprovided for, they were allowed to take as next of kin. These cases, therefore, depended on particular circumstances, and do not lay down any general principle affecting the present case. On the other hand, in *Smith v. Smith* (l), Vice Chancellor Shadwell (m) remarking on the absence in that case of the words "and unmarried," says expressly, that if those words had been introduced "the children would have been excluded." The true principle of construction is, that if the settlement does not in terms provide for issue, the Court may be justified in saying that, though not expressed, such must have been the intention of the parties, and so may give the estate to the issue under the words next of kin. But where the settlement makes, as it does here, a proper provision for the children of the marriage, and gives power to provide for those of a future marriage, it has satisfied all the ordinary requisites of a settlement, and the circumstance that a possible case may exist, in which, through the neglect to use the power, a child may happen not to be provided for, will not affect the rule that

(f) 3 Bro. Ch. C. 316.

(g) 9 Law J. (Ch.) N. S., 329.

(h) 22 Beav. 328.

(i) 3 De G. M. & Gord. 965.

(j) 3 Kay & Joh. 162.

(k) 30 Law J. Rep. Ch. 221.

(l) 12 Sim. 317.

(m) Id. 326.



the primary signification of the word is to be applied to it.

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CLARKE  
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v.  
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Sir *H. Cairns* and Mr. *Jessel* for the Respondents:

The word “unmarried,” has no settled primary meaning, but is of a flexible meaning, and what it means is to be ascertained in each case by seeing what is the general intention of the instrument where it is used. In *Pratt v. Mathew* (n), when under appeal, Lord Justice Knight Bruce pointed out that in the settlement there it is used twice, and each time with a different meaning, and the decision of the *Master of the Rolls* was varied. The only instances in the books in which “unmarried” has been construed “never having been married,” are cases of wills, in which a gift to the “unmarried daughters of A.” received that construction, for otherwise the plain intention of the testator would have been defeated. It could not have had that meaning here, for the possibility of two marriages was contemplated, and power was given her to dispose of part of the property, notwithstanding coverture by this or by a future husband. Marriage, and marriage more than once, had, therefore, been in the contemplation of the parties as a possible event, and consequently the birth of children and provision for them must have been intended. Then it never could have been meant that under any circumstances the property should go away from a child that had been born in order to benefit collateral relations. The words mean that the wife is to exercise the power as if she was *discoverte*, and in default the property is to go to her next of kin, and a child clearly comes under that description; and a child having come into existence the provisions of the settlement have been fulfilled, and

(n) 8 De G. M. & Gord. 522.



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CLARK  
and Othersv.  
COLLIS  
and Another.

the property, in default of issue upon that child.

The case of *Maugham v. Pi* present. That was the case will; the lady had a power of could have provided for children in their favour; she died leaving behalf prayed a declaration in *Chancellor* decided that unmarried never having been married was raised there which is raised; on appeal, Lord *Cotton* merely meant "discovered," and a case nothing but absolute and rather compel, the court to add would have such an effect as *dren*.

Can the word "unmarried" It may. The limitation is to blood and in kin to her." Had it entitled would not have taken butions, but would have taken consequently as joint tenants, the clause goes on expressly to who would be entitled under the a meaning as the Appellant contended at all events in fact, for, from the of her dying without having had of this being a settlement upon

The authorities cited on the In *Maberly v. Strode* (q), the v trusted with the words "shall r

(o) 9 Law J. (N. S.) Ch. 329.

(p) 10 Clark & Fin. 215.



construction, "without being married," was rightly put upon it. In *Bell v. Phyn*(*r*), which was also the case of a will the words were "without being married, and having children," and the meaning assigned to the words was, without having been married, and this meaning was rightly given, because it was impossible for the testator to do otherwise than provide in that way as to future events.

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In *Hall v. Robertson* (*s*), the legacy to the "son and unmarried daughters" of A., was, by the *Vice-Chancellor*, declared to go only to those daughters who had never been married, but on appeal, the *Lords Justices* restricted that meaning to the date of the codicil, because, on the whole context, the testator's intention would otherwise have been defeated.

Then what has been the construction of the word "unmarried" in settlements? In *Hoare v. Barnes* (*t*), which was a case of a settlement, Lord *Thurlow* said, "it could not be contemplated in a marriage settlement that the wife should die unmarried," and held the word there to mean having ceased to be married. The real object was to secure her the power to dispose of the money as if she had survived her husband. Then came *Hardwick v. Thurston* (*u*), which was the case of a will where the words were "sole and intestate;" they were written of a woman who was married, and they were held to exclude the husband but not to exclude the child who took as next of kin. At common law too, "dying unmarried" has been held not to mean never having been married; *Doe and Baldwin v. Rawding* (*v*). In *Maugham v. Vincent* (*w*) the decision proceeded on the belief that to

(*r*) 7 Ves. 453.

(*u*) 4 Russ. 380.

(*s*) 22 Law J. (Ch.) 1054;

(*v*) 2 Barn. & Ald. 441.

4 De G. M. & Gord. 781.

(*w*) 4 Jur. 452; 9 Law Jour.

(*t*) 3 Bro. C. C.

(N. S.) Ch. 329.



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put another construction on the words used would be to exclude the children. That was the key of the decision. *Smith v. Smith* (x) does not apply here. The only question there was, who was the next of kin at the death of the father or of the son. In *Coventry v. Lord Listerdale* (y), the meaning given to these words was merely "*discoverte*." In *Pratt v. Mathew* (z), the provision being on a settlement was held to be for the benefit of the children, and to be used merely to exclude the marital right. *Norman's trusts* (a), is most important. There a moiety of a settled fund was to be held in trust, after the death of the wife if she died in the lifetime of her husband, to such uses as she should appoint: on default of appointment to such persons as at her decease would have been entitled to her personal estate under the Statute of Distribution, if she had died intestate, and without being married. She did die in her husband's lifetime, and without having appointed, and it was held that the fund went to her children, because they would otherwise be unprovided for. Then in *Sawyer's case* (b), the trust was for the wife, then for the husband for life, then for the children at twenty-one or marriage, but if none should live to take a vested interest, for such of the persons as would then be entitled in case she had died intestate and unmarried. She made two marriages, had children by the second marriage only, and they were held entitled. And in that case a dictum of the Vice-Chancellor *Shadwell* in *Smith v. Smith* (c), which indicated that the children might be excluded by the word "unmarried," was expressly disapproved. These cases shew that the word has a flexible meaning, and that it is always

(x) 12. Sim. 317.

(y) 10 Jur. 793.

(z) 22 Beav. 328.

(a) 3 De G. M. & Gord. 965.

(b) 3 Kay & Jo. 153.

(c) 12 Sim. 317, 326.



to be construed in favour of giving the property to the children of the marriage, and not of giving it over to the collateral relations unless that object has totally failed.

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Mr. *Pearson* appeared for the trustees.

Mr. *Rolt* in reply, *Maugham v. Vincent* cannot be supported. But even if it can be, it is distinguishable from the present. No provision was made there for the children unless the words used could be construed to make one. Here there was ample provision for children, but if they failed, the object was to prevent the property going to the husband and his family, and therefore the wife had no power given her to make a settlement on the husband during his life. Had she done so, that would have had the effect of giving the property to a second wife, or to the husband's family, and those were the very things which it was desired to avoid.

Lord *Cranworth*, after stating the case, said:—

What Vice-Chancellor *Wood* determined was this, that the person who took under the limitations which exist here, subject to the life interest of *Thomas Cooper Colls*, the husband, was the infant child, who survived the mother. It is not necessary to go into detail more than to say, that the Respondents represent that infant child; and, therefore the *Vice-Chancellor* determined that they were entitled. And the question is, whether he was right in that decision. I have come to the conclusion that the *Vice-Chancellor* was right.

The settlement provides for the husband and wife during their lives, and for the issue of the marriage attaining twenty-one; and then proceeds, that if there should be no such child, the money in question should, subject to the life interests of the intended husband and



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wife, be held in trust for the person or persons who, at the decease of *Mary*, the intended wife, should be "of her blood and in kin to her, and who would have been entitled to the same under the Statute of Distribution in case she had died intestate and unmarried." What is the meaning of the word "unmarried"? It may, without any violence to language, mean either "without ever having been married," or "not having a husband living at her death."

If the former construction be adopted, then, if the wife should survive her husband, and afterwards marry and have children, her collateral relatives would take the fund to the exclusion of her own issue. If the latter construction be adopted no such result will follow. This seems to me to be conclusive. It is impossible to suppose that the framers of the settlement intended to use the word in a sense which would exclude the possible issue of the wife in favour of her collateral relatives.

But it was said, in putting on the word "unmarried" the construction which I adopt, we shall be violating a well-known canon of construction, namely, that effect, if possible, is to be given to every word used; and here, if the meaning of the word "unmarried" is "without having a husband living at her decease," the word was superfluous and unnecessary; for as the provision was that the fund should go to the persons entitled under the statute as being of her blood and kin, that would necessarily exclude the husband. My Lords, I admit the canon of construction to be such as was contended for; but such a rule must, I conceive, bend to circumstances.

It is true that, examining the language critically, we find that the word "unmarried," interpreted as I think it must be interpreted, is redundant. It is implied in the other words used. But the question is, whether the



rule of construction to which I have referred is of so inflexible a nature that we must defer to it even though it might cause family property to go in a manner entirely at variance with the ordinary habits and usages of mankind. I think not. The language of conveyancers is proverbially prolix and redundant. In the very passage now before us, and on which we have to put a construction, there is unnecessary verbiage. The trust is for the benefit of the persons who, at the decease of the wife, should be of her blood and kin, and entitled to her personal estate by virtue of the Statute of Distribution. It was unnecessary to say anything of the persons being of her blood and kin; it would have been sufficient to say, that it should go to the persons entitled under the Statute of Distribution. They must, in order to be entitled under the statute, be of her blood and kin. I allude to this only to show, that conveyancers are often in the habit of using expressions which are clearly superfluous, and, therefore, the mere circumstance, that a word, if used in one sense, would have been unnecessary, cannot be held to show conclusively that it must have been used in a different sense, if the effect of its being used in that different sense might be to carry property in a course of descent at variance with all the feelings and habits of mankind.

I will only add that the construction which the *Vice Chancellor* put on the word, and to which I subscribe, is in harmony with the modern authorities in all, or most of which the word "unmarried," construed as it was construed, was superfluous. Thus, in *Maugham v. Vincent*(d), decided by Lord *Cottenham* in 1841, the trust was for

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(d) 9 Law J. (N. S.) Ch. 329.



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such persons "as would by virtue of the Statute of Distribution have become entitled to the personal estate of the intended wife in case she had died intestate and unmarried." Lord *Cottenham* held that the word "unmarried" meant merely leaving no husband living at her death; and yet so interpreted, the word was unnecessary, for the husband could not have taken by virtue of the Statute of Distributions. The same observations apply to the cases of *Ex-parte Norman* (e) before the Lords Justices, *Pratt v. Matthew* (f) before the *Master of the Rolls*, and *In re Saunder's trust* (g) before Vice Chancellor *Wood*.

I do not forget, that in the settlement now before us, there is a power which, in the event of a second marriage, would have enabled the wife to give the fund to the issue of a second marriage, if there should be no issue of the first marriage, who should become entitled to it. That is true. But she might never exercise that power, and I cannot believe that she could have intended to give her property in any event to her collateral relatives in preference to her own children by a second marriage; which, adopting the construction of the word "unmarried," contented for by the Appellant, must have been the result if she had had no issue by her first marriage, and had afterwards contracted, and had issue by, a second marriage, without making any fresh provision for them.

On these short grounds I have only to express my concurrence in the view of the case taken by Vice Chancellor *Wood*.

I have farther to add that I have reason to know, per-

(e) 3 De G. M. & Gord. 965.

(f) 22 Beav. 328.

(g) 3 Kay & J. 152.



fectly conclusively, that the decision which I have arrived at without any hesitation, is that at which my late lamented noble and learned friend, Lord *Campbell*, the late Lord Chancellor, had also arrived.

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Lord *Wensleydale* :

My Lords, the question in this case depends upon the true construction of the word “unmarried” in this marriage settlement.

If we had been called upon to construe that instrument at the time of its execution, and had applied to it, as we are bound to do, the rules for the construction of all written instruments, rules which are founded on reason and good sense, and which have been adopted for the wise purpose of securing as much certainty of decision as the subject is capable of, I must own, that I should have found no difficulty in advising your Lordships, that the construction put upon this settlement by Vice Chancellor *Wood* was wrong. The only rule material to be adverted to in the construction of this settlement is, that it is to be construed altogether, and the words of it are in all cases, to receive a construction which will give to every expression some effect rather than one which will render any of the expressions inoperative.

The word “unmarried” (*see* the cases referred to 1 *Jarman*, ch. xvi) in this sentence “in case *Mary Foulsham* died intestate and unmarried” is no doubt capable of two different constructions, it may mean either “never having been married” or “not being married,” that is, being “a widow” at the time of her death, which would exclude the marital right of the husband. The context must determine in every case in what sense the word was used.

Now in this case, if effect is given, as it ought to be, to all the words, I should say that the word “unmarried”



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ought not to have the construction that it was meant only to exclude the marital right of the husband, for that would be to render it entirely inoperative, for the terms of the trust itself effectually excluded the marital right of the husband. Under the terms of the trust the husband could not possibly take, and according to the established rule of construction, as these words would be entirely inoperative for that purpose, they ought to be construed in a sense to give them effect; and that could only be done by holding them to mean that the property should go to those who would be next of blood and kin, if she had never been married at all. Full effect would then be given, as it ought to be, to every part of the will.

It must, however, be admitted that if this, which is *prima facie* the proper construction, was so repugnant to the context that the Court could see that it never could have been the intention of parties to use the words in that sense, they ought to be varied, and the words considered as mere surplusage. If the effect of a construction according to the rule, that they should not be considered inoperative, would be to leave the children of the marriage totally unprovided for, I can see an amply sufficient reason for treating them as mere surplusage. But where there is a provision made, which the parties may with perfect reason have supposed to be amply sufficient to answer the purpose of providing for the issue of that marriage, and also even for the issue of another marriage (though cases may be suggested in which such provision might possibly fail), I cannot see any reason for not adhering to the rule, and giving full effect to the construction it requires.

The case of *Maugham v. Vincent*(*h*), where there was no provision at all for the children of the marriage, is



one in which the rule of construction I have mentioned may be considered as having been properly disregarded, and the words held to mean the same as if the wife had died without a husband, that is, had died a widow. But here there is a life interest given by the settlement to the husband and wife respectively in the two moieties of 2,000 *l.* each, and a power of appointment in the wife to assign those sums to the children and grandchildren in such shares as she may direct; and, in default of appointment, shares are given to the sons at twenty-one, or to their children if they died before, or to daughters at twenty-one or marriage. Surely this power of appointment might very reasonably be supposed by the parties to be amply sufficient to provide for their children if they had any. Nor is the provision in default of appointment to be considered as insufficient, if that alone had been in the will; for though it does not provide for the case of Mrs. *Colls* dying, leaving children under twenty-one or unmarried, and gives nothing towards their maintenance even in that case, yet there is nothing so unreasonable in supposing that the husband would provide for their maintenance out of his life interest in the whole 4,000 *l.* A like observation may be made on the absence of a provision for the children of a second marriage. There is nothing unreasonable in settling the whole interest on the children of a first marriage, and, in the event of their death, leaving the widow a power of appointment which would provide for a second family. On the whole, then, I can see no reason for not putting on the words of this will the construction which the ordinary rule requires, if we were now considering the meaning of the settlement of 1816, at the time it was made.

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In this case there are no prior decisions which give a



so plainly unreasonable, that you can never suppose that the parties to the settlement could have meant the word "unmarried" except as surplusage. With the greatest respect to the very learned Vice-Chancellor, I must consider such a supposed rule of construction unauthorised. The true rule is undoubtedly what I have stated, and to lay down a rule that a particular provision is necessary for all the presumed cases of natural affection, so that its absence would render the instrument unreasonable, is, in my judgment, unwarranted. I do not think that there is anything unreasonable in this provision; and therefore my opinion is, that the construction according to the established rule is the right one, and the judgment ought not to be reversed.

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Decree affirmed; and appeal dismissed, with costs.

Lords' Journals, 17th July 1861.

THOMAS JOSEPH EYRE - - - Appellant.  
GEORGE MCDOWELL (Official Manager of the Tipperary Joint Stock Bank) and JOHN WHEATLEY - Respondents.

entered into an agreement with E. for securing payment of money owing by him to E. In this agreement there was a covenant (amongst others) that John S. would give to E., as one of the securities, a mortgage on the lots of a particular estate, James S., the brother of John and therein described as being the owner of lot No. 1, was to join in the mortgage of it. By a subsequent agreement, under seal, to which John S., E., and James S. were parties, after reciting the first agreement, John S. covenanted that he would, before a certain time, convey, or cause to be conveyed, to E., Lot 1, to be held by E. in fee: "And it is hereby agreed by and between the parties hereto," that if John S. shall die, E. the monies due to him, E. shall re-transfer "all securities

1861.  
May 28.  
June 3, 4.  
July 17.  
Registry Acts.  
Priority.  
Equitable  
Mortgage.  
Registered  
Judgment.  
3 & 4 Vict.  
c. 105.  
13 & 14 Vict.  
c. 29.  
Costs.



and was the most valuable. *John Sadleir* purchased all the lots, except lots 1 and 6, for *Eyre*, but (as *Eyre* afterwards alleged) fraudulently got *James Sadleir*'s name inserted as the purchaser of lot 1. In consequence of this, *Eyre* did not want to hold the property, which it was then arranged should be treated as the property of *James* and of *John Sadleir*. The latter was largely indebted to *Eyre*. On the 13th May 1855, certain articles of agreement between *Eyre* and *John Sadleir* were executed, which recited that in consideration of a sum of 44,884*l.* by *John Sadleir* paid or secured in manner thereafter mentioned, *Eyre* agreed to sell to *John Sadleir*, all his, *Eyre's*, interest in the *Coolnamuck* estate, particularly the lots 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, the sum of 4,961 *l.*, portion of the purchase-money, to be secured to *Eyre* by an acceptance of the *Tipperary* Joint Stock Bank, and the balance 29,922 *l.* by a transfer of shares in the Royal *Swedish* Railway Company, and by a transfer, representing a mortgage, of the lots 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, "and also of lot 1 being the demesne of *Coolnamuck*, the property of *James Sadleir*, Esq., who is to join in said mortgage as to said lot, No. 1, subject however to a prior mortgage for 15,000 *l.* with interest thereon at five per cent." The principal sum was not to be called for within five years. Lot 1 was to be released from the mortgage to *Eyre* at any time upon payment to *Eyre* of the sum for which it was purchased by *James Sadleir*, or on substitution of other landed property of equal value. As to the other lots, *John Sadleir* was to be at liberty to sell them as opportunity might occur, applying the proceeds in liquidation of the incumbrances on them (a).

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 {  
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 v.  
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(a) This power of sale seemed to have been exercised as to lots 3 and 4, but there was no statement of any money paid on account of the money obtained from the sales.



*John Sadleir* should no longer have the right to sell any portion of the *Coolnamuck* estate, which that agreement gave him. “And it is farther agreed *by and between the parties hereto*, that if *John Sadleir* shall at any time pay to *Eyre, &c.*,” *Eyre* should re-assign. And it was provided that if within five years the monies secured were not repaid, *Eyre* might “by foreclosure, sale, or mortgage, or by any other lawful means,” raise the deficiency out of the railway shares and out of the lands. “And each of them the said *John Sadleir* and *James Sadleir* doth hereby or himself, his executors, &c., covenant with *Eyre*, his executors, &c., that if whilst any of the monies intended by these presents to be secured are due, default shall be made” in the annual payment of 5,000 *l.*, *John Sadleir* or *James Sadleir*, his heirs, &c., would pay the deficiency, so that by or out of the interest of the railway shares or by cash payments of *John Sadleir* or *James Sadleir* or by other means, *Eyre* should be secured in the payment of 5,000 *l.* a year. And as a farther security *John Sadleir* endorsed to *Eyre* a promissory note of *William Dargan, Esq.*, for 12,000*l.*, dated 1st May 1855, and payable 3rd May 1856, in London.

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This deed was not registered. The railway shares and the note were stated to have been forgeries.

On the 25th *August* 1856, an order was made by the Court of Chancery on *James Sadleir*, to pay to *G. McDowell*, the official manager of the *Tipperary Joint Stock Banking Company*, the sum of 65,149 *l.* due from him to the company. The affidavit to register this order as a mortgage under the 13 & 14 *Vict. c. 29*, was made on the 3d *November* 1856. In this affidavit the lands of *Coolnamuck*, in the county of *Waterford* were, as required by the statute, specially mentioned, and the registration was completed on the 7th of that month. Proceed-



On the 24th *June* 1857, the Appellant and on the 27th *October* 1857, made a for Incumbered Estates Court, "In the ma of *James Sadleir*, owner, and of *G. A* manager, &c. petitioner," and submitted th ought, by the agreement under seal of 6 to be held to have recognised and adopte of 13th *May* 1855, and was bound to con gage; thereby agreed to be executed, s to the lot No. 1 of *Coolnamuck*, and ths entitled to be placed on the schedule of i this matter, in the same manner as if *J* executed the mortgage pursuant to the t agreement; and to the same extent as had executed a farther mortgage of the suant to the articles of agreement, under *October* 1855.

On the 15th *January* 1859, by a de *Longfield*, in the Landed Estates Court, Appellant to be treated as an incumbr the lands of *Coolnamuck*, was overruled. appeal was presented by him to the Coi Chancery in *Ireland*, and on the 31st order of Judge *Longfield* was reversed.



the “charges agreed to be given to *Eyre*, and under which he became an equitable incumbrancer on lot No. 1, are *puisne* to the registered incumbrance” of *McDowell*. *Eyre* carried this Order before the Court of Appeal, by which, on the 23d *November* 1859, it was affirmed; *Eyre* then appealed to this House against the Order, so far as it declared his incumbrance to be *puisne* to the charge of *McDowell*; and *McDowell* brought a cross appeal against it, so far as it allowed *Eyre* to be an incumbrancer on the estate.

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Sir *H. Cairns*, Mr. Serjeant *Sullivan* and Mr. *J. B. Murphy* (both the latter of the *Irish* bar), for the Appellant:

The question as to priority here depends on the construction of 3 & 4 *Vict.* c. 105, and 13 & 14 *Vict.* c. 29. These statutes specially relate to *Ireland*, but the former of them is almost exactly similar in terms to the *English* statute 1 & 2 *Vict.* c. 110, the decisions on which are consequently applicable here. *Whitworth v. Gaugain* (b) is directly in point with this case. There it was held, that an equitable mortgagee of lands was entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, subsequently recovered a judgment against the owner, and obtained possession of the lands under an *elegit* and attornment of the tenants. The principle had been already acted on in *Abbott v. Stratten* (c), where Lord Chancellor *Sugden* said, that he had never heard it doubted that an equitable mortgage took precedence over a subsequent judgment. The principle was, that the judgment creditor took that, and that only, which the debtor possessed, and had the power to give him. Of

(b) 3 *Hare*, 416; 1 *Phill.* 728.

(c) 3 *Jo. & Lat.* 603, 614.



*land* as securities for money. The object of this statute is, to compel the creditor, who wishes to make his judgment a security against the land of his debtor, to register the judgment, and in the registration declare what land he believes the debtor to have, and the land so described is that which is affected by the judgment. The sixth section directs how and when the affidavit is to be made and filed, and the judgment registered; and the seventh section declares what shall be the effect of registration. The true meaning of that section is, that only that interest in the land vests in the creditor which the debtor can properly call his own at the time of the registration. Such, with one or two curious exceptions, has been the construction always put on this Act by the courts in *Ireland*. The first decision upon the Act was that of

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for the purpose of such entries the creditor under such judgment, &c. shall be deemed the grantee, and the debtor thereunder shall be deemed the grantor, and the amount of the debt, damages, costs, or moneys recovered or ordered to be paid thereby, shall be deemed the consideration," &c, and the same fee is to be paid as for registering the memorial of a deed.

Sec. 7. "And be it enacted, that the registration as aforesaid, of such affidavit shall operate to transfer, and vest in the creditor registering such affidavit, all the lands, tenements, and hereditaments mentioned therein, for all the estate and interest of which the debtor mentioned in such affidavit, shall, at the time of such registration, be seised or possessed at law or in equity, or might at such time create by virtue of any disposing power which he might then, without the assent of any other person, exercise for his own benefit, but subject to redemption on payment of the money owing on the judgment, decree, order, or rule mentioned in such affidavit; and such creditor, and all persons claiming through or under him, shall, in respect of such lands, tenements, and hereditaments, or such estate or interest therein as aforesaid, have all such rights, powers, and remedies whatsoever, as if an effectual conveyance, assignment, appointment, or other assurance to such creditor of all such estate or interest, but subject to redemption as aforesaid, had been made, executed, and registered at the time of registering such affidavit."



In 1855 a decree, on consent of *A.*, was made in an administration suit, declaring *A.* a trustee for himself and his brothers and sisters, as to certain lands in which he had the legal estate. In 1856 *A.* obtained a farther interest in these lands, which farther interest was held to be a graft subject to the trusts already declared. The judgment creditor in 1856 registered his judgment as a mortgage under the 13 & 14 *Vict.* c. 29 ; and it was held that the registration only affected the beneficial interest existing in the debtor at the time of registration, and that when the legal estate of the debtor vested in the creditor, it was, by the operation of the statute, subject to the equities to which it had been subject when in the hands of the debtor. As the Lord Justice observed (*m*), “ this is all plain according to the settled principles of equity ; and being so, it is sought to be subverted by the Act of Parliament, under whose provision the judgment is registered. If such were the effects of that Act, I have no hesitation in saying that never was there any enactment so essentially unjust, or subversive of the established rules of law and the rights of parties.” The case of *Ex parte Hamilton* (*n*), which was afterwards decided, and appears to be in contradiction to *McAuley v. Clarendon*, cannot be supported, and the present appeal may be considered as an appeal against the decision there pronounced. There a judgment registered under 13 & 14 *Vict.* c. 29, was held to be entitled to priority over a prior unregistered instrument, of which the conusee had not had notice. The instrument, which was a letter accompanying the deposit of a lease, amounted to an equitable mortgage of the lease, and the judgment was registered with a view to affect that lease. The fallacy on which that

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(*m*) *Dru. Cas. Temp. Nap.* 442.      (*n*) 9 *Ir. Ch. Rep.* (N. S.) 512.



of *Ex parte Hamilton* must be overruled ; and the case of *McAuley v. Clarendon* treated as the decisive authority, without being affected by the distinction here supposed. It appears to be a well-established principle of equity, which it was never the intention of the Act to affect, to give to the judgment creditor all that the debtor had then the power to dispose of, but not to deprive any persons of rights already properly vested in them.

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The 6 *Anne*, c. 2, cannot in any way be relied on to support this judgment. The 4th section of that statute makes a registered memorial effectual according to priority of registration, "according to the right title and interest of the person conveying." That will not assist the Respondent. The 5th section does not give a judgment creditor priority over an unregistered deed, but if there had been a registered and an unregistered deed, and a judgment, then the unregistered deed would give place to the judgment, but even then only so far as concerned the lands mentioned in the memorial of the deed which had been registered, *Ford v. Brown* (*p*). That was a peculiarity of the *Irish* registry law. When once a deed was put on the registry, want of notice as to the land being affected by it would not be of any avail to protect even a subsequent purchaser for value. The registry was deemed notice to, or at least bound the land in the hands of, every subsequent taker, *Mill v. Hill* (*q*). As there is no tacking in *Ireland* as in *England*, the

rest, which the debtor had, not that which by no contrivance was it possible for him to acquire ; and that it is utterly impossible for a creditor to perpetrate the injustice, under colour of the Act, of spoliating the established rights of *cestuis que trust*, to pay the debts of trustees."—*Dru. Cas. Temp. Napier*, 444 ; 8 *Ir. Ch. Rep. (N.S.)* 577.

(*p*) 2 *Hud. & Br.* 384.

(*q*) 3 *H. L. Cas.* 828.



all such interest only as the debtor could at that time lawfully dispose of. In *Beavan v. Lord Oxford* (r) it was argued that the judgment creditor stood in the same situation as if he had been a grantee for valuable consideration, and the Court held that he was not to be treated as a purchaser within one statute, and that within another the debtor had not such a disposing power over the estate as to enable him to obtain a priority. But the difficulties which lay in the way of the debtor there do not exist here. The affidavit in the *Irish* Act is a form by which it was intended to put a judgment creditor in the situation of a grantee for value. In *Ireland*, a practice existed of taking judgments as securities in lieu of mortgages and other charges; yet the *Irish* Acts did not provide for the registration of judgments at all. But the extraordinary practice was adopted of allowing a judgment to affect lands in priority to an unregistered deed, but only if there was a previously registered deed affecting those lands. The Legislature considered this, and provided a remedy in favour of the judgment creditor. The 3 & 4 Vict. c. 105 enabled him to register his judgment. By that Act a registered judgment requires to be re-docketed within a certain time. In *Fury v. Smith* (s) there was a regular conveyance from the sheriff, but the creditor did not get the benefit of that conveyance, for a previous voluntary conveyance unregistered took precedence over it. That was a case which attracted much attention, and being afterwards acted on, a remedy was, by the 13 & 14 Vict. c. 29, given for the mischief which that case shewed to exist. The preamble of the statute refers to all these matters. The judgment is directed by that statute to become available as a conveyance, though not until an affidavit, specially described by the Act, has been

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(r) 6 De G. M. & Gord. 507.

(s) 1 Huds. & Br. 735.



the *Irish* Act did not mean to permit tacking, and after quoting the words of the 4th section, says, "Now the Act did not mean by the words 'according to the right title and interest of the person so conveying' only to pass the estate as it might already be affected by an unregistered instrument as against the person conveying; that would have set the whole Act open; it must be understood to mean 'according to the right, title, and interest, which such person had to make a conveyance, which conveyance would have been good, if such prior conveyance had not existed.' The prior words must be taken, therefore, as giving priority both at law and in equity to any deed registered, by which lands comprised in a deed not registered can be in any way affected; the intention was to make priority of registry the criterion of title to all intents and purposes whatever." That is the true principle of the *Irish* law, and the right and interest must be the right and interest which appear on the registry. The same construction was put on these qualifying words in the *Irish* statute, "according to the right, title and interest," by Lord Chief Justice *Tindal*, in delivering the opinion of the Judges to this House in *Warburton v. Loveland* (*u*), when he said, "The meaning of those words appears to be according to what *would have been* the right, title, and interest of the person making the second conveyance; had there been no deed but what appears upon the register," which is in substance a complete adoption of what had been previously said by Lord *Redesdale*, and shows, that in *Ireland* an unregistered conveyance would always have yielded to a subsequent one which was registered. The Act 13 & 14 *Vict. c. 29*, has not altered what may thus be considered as the

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(*u*) 2 *Dow. & Clark*, 480, 499.



the son's assignees, and the mortgagee for

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And Lord Chancellor *Sugden* declared the of the jointure must be first satisfied, that the d mortgage was the next charge, and the assign-

e last. So that, in that case, a mortgage which

a registered was actually declared to have priority,

r a mere equitable incumbrance, but over a

r assignment of a previous date, which had not

gistered. In *Re Ryan* (z), a judgment obtained

a bankrupt, and registered as a mortgage under

*Vict. c. 29*, before the issuing of the commission

like manner, declared a charge upon his lands in

to the debts under the commission.

*Huthwaite* (a), which was a decision at the Privy

in *Ireland*, was the converse of this case, for it

the importance of the registry according to the

the *Irish* law, and proved that even a judgment

ad been registered, but which had not been re-

l within the limited time, lost its priority as

a judgment which had been registered between

od when the registry of the earlier judgment

to be renewed, and that at which it was actu-

ewed. But there the first judgment re-acquired

ority on fresh registration; and in *Ex parte*

b), which was a case on this statute, it was dis-

elared, that there was "no distinction between a

e and a registered affidavit."

case of *McAuley v. Clarendon* is, in truth, to be

to the distinction of the effect of a judgment

al estate, and on an estate in trust. The conten-

re was, that the creditor was entitled to take the

tate, and hold it so as to supersede the trust

1. Ch. Rep. (N.S.) 33.

(b) 6 Ir. Ch. Rep. (N.S.) 17.

2. Ch. Rep. (N.S.) 54.



treated as his estate. The *Lord Chancellor* (Lord Campbell): Lot 1 of *Coolnamuck* is distinctly mentioned. An equitable charge could not be created in more express terms. Lord *Wensleydale*: And he covenants that if *Eyre* is not fully paid, *Eyre* shall be at liberty to raise the money, not only out of the shares, but “also out of any part of the lands as by these presents agreed to be granted or otherwise assured.”] He only covenants that the interest shall be paid. There is no covenant by him directly applicable to that part of the *Coolnamuck* estate of which he was the proprietor.

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Lord *Cranworth* :

My Lords, in this case, the question to be decided is as to the priority of two claimants on the mansion and demesne of *Coolnamuck*, part of the estate of *James Sadleir*. *Thomas Joseph Eyre*, the Appellant, claims as equitable mortgagee, by virtue of a deed executed by *James Sadleir*, dated the 6th of *October* 1855, in which it was stipulated that in certain events, which have happened, it should be lawful for the Appellant to raise by sale or mortgage of (*inter alia*) the lands in question, a large sum of money due to him from *John Sadleir*, the brother of *James*.

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We intimated at the close of the argument for the Respondent, that we were clearly of opinion that this deed amounted to an equitable mortgage by *James Sadleir* to the Appellant of the lands which he was thereby empowered to sell. On this part of the case, we never had a doubt; the right of the Appellant as equitable mortgagee is too clear to need any argument or reasoning in its support.

*M'Dowell*, the Respondent, who is the official manager of the *Tipperary Joint Stock Bank*, claims by virtue of



entering up judgment or afterwards have any disposing power which he might without the consent of any other person, exercise for his own benefit, in like manner as he might theretofore have delivered execution of a moiety, and by section 22 (which follows exactly section 13 of the *English Act*), it is enacted that a judgment shall operate as a charge on all lands of which the judgment debtor shall at the time of entering up judgment or afterwards be seised or possessed, or over which such judgment debtor shall, at the time of entering up judgment or afterwards, have any disposing power which he might, without the consent of any other person, exercise for his own benefit, using in describing the property to be affected, the very same words as had been used in the former section, and the clause then proceeds in these terms: “and every judgment creditor shall have the same remedies in a court of equity against the hereditament so charged by this Act as he would be entitled to in case the judgment debtor had power to charge, and had by writing under his hand agreed to charge, the hereditaments with the amount of the judgment debt and interest.”

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Sections 27 & 28, (following sections 18 & 19 of the *English Act*), then proceed to give to orders of Courts of Equity the same force as belongs to judgments at law; with a proviso that no judgment, nor any order of a Court of Equity, shall affect lands under the Act, until it has been registered in the mode there prescribed.

If the case had to be determined on this statute alone, there can be no doubt, either on principle or authority, that the Appellant's unregistered equitable mortgage would have taken precedence of the Respondents' registered order of the Court of Chancery.

When the Legislature enabled the sheriff to seize the



did not intend to enable the creditor by judgment to take what his debtor could not give.

The question, therefore, resolves itself into this, How have the rights of the parties been affected by the subsequent statute of 13 & 14 *Vict.* c. 29?

That Act, after reciting among other things the clauses of 3 & 4 *Vict.* c. 105, to which I have adverted, enacts in the first section, that none of these provisions shall apply to judgments entered up, or to decrees or orders made, after the passing of that Act; and then by way of substitute for those provisions, it enacts in section 6, that where any judgment shall be entered up or decree or order shall be made after the passing of that Act, and the creditor shall know or believe that the debtor is seised or possessed of any lands, or has a disposing power over any lands, it shall be lawful for him to make and file in the Court in which the judgment has been entered up, or the decree or order has been made, an affidavit, stating among other things, the name of himself, and the name of his judgment debtor, the amount of the sum recovered, and the particulars of the lands of which the debtor is seised or possessed, and to register such affidavit in the office for the registry of deeds, by depositing there an office copy of the affidavit which shall be entered in the books and indexes of the office as if it were the memorial of a deed, and the clause goes on to provide that for the purpose of such entries the judgment creditor shall be deemed the grantee, the judgment debtor the grantor, and the amount of the debt the consideration.

By the next section (sect. 7) it is enacted that this registration shall operate to transfer to and vest in the creditor all the lands mentioned in the affidavit, for all the estate which the debtor had therein, subject, however, to redemption on payment of the amount of the judgment

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deviation from principle. But the Act contains no indication of the sort. Its object in the clauses in question appears to have been merely to get rid of the inconvenience so strongly felt in *Ireland*, arising from the prevailing habit of taking securities by judgments, which materially impeded the transfer of land. The statute to prevent that evil compels the judgment creditor to specify on what lands he means his debt to attach.

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When that is done there is nothing to show any intention of varying the rights of debtor and creditor, of putting them in a position different from that in which they certainly stood under the prior statute. All that the seventh section of the statute does is to transfer to the judgment creditor the lands mentioned in the affidavit, "for all the estate and interest which the debtor had therein at law or in equity, or might create therein by virtue of any disposing power;" following exactly the language of the prior statute, under which it is certain that nothing could be transferred except that which the debtor could transfer to a purchaser or mortgagee, with notice of all prior titles, *i. e.* that to which the debtor was beneficially entitled.

Great stress was laid in the Court below on the fact, that effect is given to the judgment as if the creditor had obtained a conveyance from his debtor, and that conveyance had been registered at the time of the registration of the affidavit. If, it was said, such a conveyance had in fact been made and registered, it would have taken precedence of the prior unregistered equitable mortgage; and it was said that the requiring registration clearly indicated the intention of the Legislature to give to the instrument registered priority over that which had not been registered.

This reasoning does not satisfy me. There was an



object of the Registry Act was to give notice, and where that notice has been given, independently of the registry, it has been considered that it would be a fraud in any person to contract with the owner on the pretence that he had no notice by means of the registry. But no such principle is applicable to the case of a judgment creditor. He does not claim by contract, but by virtue of a statute giving him a title independent of any question of notice; and the result would be, that the consequences of the equitable doctrine of notice might always be defeated by the subsequent incumbrancer proceeding on a judgment and affidavit instead of, or in addition to, an ordinary mortgage.

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My interpretation of the statute is, that a judgment creditor shall no longer have a claim by way of lien, extending over all his debtor's lands, but only on those which he enumerates in an affidavit. By making and registering such an affidavit, he shall have the same rights as he would have had if his debtor had made a mortgage to him of all his estate and interest in the lands enumerated, and as if he had registered that mortgage, or as if he had obtained from his debtor a mortgage of all the estate and interest which the Sheriff might have taken on an *elegit*, *i. e.*, of all the beneficial interest of the debtor.

The Appellant called our attention particularly to the eighth section, which enacts, that where an affidavit shall have been registered pursuant to the Act, then every voluntary conveyance made subsequently to the date of the judgment shall be void as against the judgment creditor. This provision, it was truly said, would have been superfluous if the effect of the judgment and subsequent registration of the affidavit was to put the creditor, to all intents and purposes, in the position of a registered mort-



The statute of *Anne*, therefore, leaves the question untouched.

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~  
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Three previous cases have been decided in *Ireland*, in which the decision has been the same as that now under appeal, viz., *Corbett v. De Cantillon* (*g*) and *Montgomery v. M'Evoy* (*h*), and *In re Hamilton's Estate* (*i*). In the first two the reports are very meagre, but in the last the *Lord Chancellor* and the *Lord Justice* of appeal go fully into the argument, and give their reasons, which are in favour of this Respondent, founded mainly on the sixth and seventh sections of 13 & 14 *Vict.* c. 29. Their Lordships considered that by the effect of these sections all the interest of the debtor in the lands comprised in the affidavit was transferred to the Respondent, as a judgment creditor, freed and discharged from the equitable incumbrance, which, in the hands of *James Sadleir*, the debtor, had previously attached on it by virtue of the unregistered mortgage. I have already stated my reason for dissenting from that view of the case.

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In the only other reported case on the effect of these statutes, the view taken by the Court was in strict conformity with that which I have taken. I allude to the case of *McAuley v. Clarendon* (*k*).

In that case a judgment was obtained by a creditor, and an affidavit was duly registered against a debtor, who, in respect of the lands included in the affidavit, had been declared to be a mere trustee for himself and others. It was argued, that as the affidavit was duly registered, the creditor registering had priority over all other charges and trusts affecting the land, and particularly over the title of those declared by the decree of

(*g*) 5 Ir. Ch. Rep. (N. S.) 126.

(*h*) Id. 128 n.

(*i*) 9 Ir. Ch. Rep. (N. S.) 512.

(*k*) Dru. Cas. Temp. Nap. 433;  
8 Ir. Ch. Rep. (N. S.) 121. 568.



It has been settled by numerous authorities referred to at your Lordships' bar by Sir *Hugh Cairns*, in his most able argument, that before 1 & 2 *Vict.* c. 110, s. 13, equitable interests prevailed over an elegit, and, since that Act, a judgment entered up, operates as a charge on the beneficial interest only of the judgment debtor. The judgment creditor takes, subject to all the equities by which the debtor was bound. The *Irish Act*, 2 & 3 *Vict.* c. 105, follows the provisions of that Act, as my noble and learned friend who has already spoken has fully explained.

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Is a different construction to be put upon the 13 & 14 *Vict.* c. 29, ss. 6 & 7? I think not.

[His Lordship read them, and then the 8th section.]

It seems to me that this statute does not place the judgment creditor on the footing of a purchaser for the valuable consideration of the money payable by the judgment.

The last part of the 6th section which provides that the creditor shall be deemed the grantee, the debtor the grantor, and the amount of the debt ordered to be paid the consideration, seems clearly to apply to the form only of entry in the registration book under the 2nd and 3rd *William* 4, c. 87, ss. 11 & 12, which provides only for the names of grantors and grantees. Farther, the provision in section 8, which enacts that subsequent voluntary conveyances shall be deemed void, affords some, though not a very strong reason for holding that the Legislature did not mean to put the filing of the affidavit on the footing of a conveyance for value, for on that supposition the provision would be wholly unnecessary.

For these reasons I am of opinion that the true meaning of the statute 13 & 14 *Vict.* c. 29, is the same as that



It conveyed no more, and its effect could not be increased or lessened by the absence from, or presence on, the register of the previous or equitable charge.

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The 5th section and the 6th are shown by Lord *Redesdale* in the above cited case, to have no application to this.

I concur, therefore, in the opinion, that the judgment should be reversed.

Lord *Kingsdown* :

My Lords, I am entirely of the same opinion. I had prepared a statement of the grounds upon which I had come to this result, but the matter has been so completely exhausted by what your Lordships have heard from my noble and learned friends, that I feel it unnecessary to occupy your Lordships' time with reading it.

A discussion ensued as to the form of the Order, and as to any direction being given to add the costs of the Appellant to his security. The following Order was afterwards entered on the Journals:—

“ That the Order of the Court of Appeal in Chancery in *Ireland*, of the 31st *May* 1859, and the Order of the said Court of Appeal, of the 23d *November* 1859, so far as complained of in the said original petition and appeal, be, and the same are hereby reversed ; and it is hereby declared, that the charge or incumbrance created in favour of the said Appellant, *Thomas Joseph Eyre*, by the said agreement of the 6th of *October* 1855, is entitled to priority over the charge or incumbrance of the said Respondent, *George M'Dowell*, as official manager of the *Tipperary* Joint Stock Bank, under or by virtue of the Order of the Court of Chancery in *Ireland*, of the 25th of *August* 1856, and the affidavits of the said *George M'Dowell*, mentioned respectively in the said appeal, and the registration of



himself personally liable to restore it to parties afterwards proving themselves legally entitled.

Upon his death that liability only continues against his personal representatives, and not against his successor in office. But that successor may make himself personally liable for the acts of his predecessor, as by taking out letters of administration *de bonis non* to the same estate.

Where the nominee of the Crown had improperly paid money (thus coming to his hands) to the then Sovereign, and the succeeding nominee of the Crown had taken out letters of administration *de bonis non* to the same estate, and, in a suit by the next of kin against him, had only contested the fact of the claimants being truly the next of kin, and denied, if they were so, liability to pay interest on the sum claimed :

**Held**, that this was in substance an admission of liability to pay the principal to the next of kin, and the claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay the principal.

*A.* a Defendant, as administrator on the nomination of the Crown, in a suit by the alleged next of kin, died ; *B.* his successor in office took out letters *de bonis non*. A bill to revive the suit was filed, and an order made thereon recited the prayer of the bill thus : “ that the said suit and proceedings, which had so become abated as aforesaid, might be revived, and be in the same plight and condition against *B.* as they were at the time of the death of *A.*, and that the Plaintiffs might have the same relief against *B.* as they would have been entitled to and had against *A.* had he still been living,” and then added, “ which is hereby Ordered by the Court as prayed :”

**Held**, that this Order did not of itself create any liability in *B.*, but merely put the suit in the same state as it had been in before *A.*’s death.

No costs were given.

THIS was an appeal against an order of Vice-Chancellor *Kindersley*, made under the following circumstances :—

On the 27th *January* 1813, Mr. *Mitford*, who was then solicitor to the Treasury, obtained as nominee of the Crown, and “ for the use and benefit of his Majesty,” a grant of letters of administration to the estate and effects of *George Frederick Köhler*, an officer of artillery, who

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deceased; that this bond required the King's nominee, within three months after obtaining administration, or as soon as the case might permit, to pay to the King's proctor, the clear surplus and produce of the estate. The answer then detailed the collection and payment of debts, and alleged that a warrant under the sign manual was issued to *Mitford*, requiring him to pay the balance to the King's proctor; that this balance, amounting to 7,842 l. 8 s. 4 d. had been accordingly paid on the 25th *May* 1814, by *Mitford*, and the answer set forth the receipt for the same.

Evidence was gone into, when it appeared that the intestate himself, on the 20th *January* 1780, received a commission as second lieutenant in the Royal Artillery, and successively rose through the intervening ranks till he was made lieutenant-colonel in *April* 1794. In *June* 1794 he married, at *St. Margaret's, Westminster, Ann Pass*. In 1798 he went out to *Syria*, receiving the rank of brigadier-general in the service of the *Sultan*. On the 1st *January* 1800, he was made a colonel in the Royal Artillery. His wife, who had accompanied him to *Syria*, died at *Jaffa* on the 14th *December* in that year, and he died on the 29th of the same month. As to the relationship, the first point was to identify *Johänn George Köhler*, who had run away from *Germany* and enlisted in the *English* artillery, with the intestate's father. A great many depositions were taken on this matter, and among them was one which set forth that the deponent, *August Kurz*, was the son of a man who had been for many years foreman of the iron foundry called the *Lower Hammer*, in the duchy of *Hesse Darmstadt*, and had the power of engaging and discharging men and apprentices; that he kept a book, in which were entered the names of the apprentices; and that deponent recol-

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which is hereby Ordered by the Court as prayed." On the 12th *February* 1831, there was a decree of the Court of Exchequer in Equity, directing Master *Spranger* to inquire who were the next of kin, and farther directions were reserved.

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In *October* 1841 the cause was, under the 5 *Vict.* c. 5, transferred to the Court of Chancery, and, in 1844, there was a bill of revivor against Mr. *Maule*. On the 14th *November* 1851, Mr. *Maule* died, and Mr. *Henry Revell Reynolds* was appointed Solicitor to the Treasury in his stead. By the statute 15 *Vict.* c. 3, it was enacted, that all proceedings at law or in equity against Mr. *Maule* as administrator, as the nominee of the Crown, pending at the time of his decease, should not thereby abate, but should continue and take effect by, in favour of, and against the Solicitor for the time being of the Treasury. Mr. *Reynolds* being thus substituted for Mr. *Maule*, as to this suit, and it having been duly continued, and other parties having come before the *Master*, he, on the 26th *February* 1859, made his report, by which he found that *Jacob Köhler*, *Johann Michael Köhler*, and *Gertrandt Schmidt* (formerly *Köhler*) were the paternal uncles and aunt, and sole next of kin, of the intestate living at the time of his death, and that *Philip Köhler*, *Hyronimus Köhler*, and *Johann Michael Schmidt*, were respectively their personal representatives. Exceptions were taken to this report with reference to the insufficiency of the proof, but they were overruled, and the report confirmed by an order of Vice-Chancellor *Kindersley*, 9th *June* 1859. A supplemental bill was afterwards filed by *Philip Köhler* (described as of *Kirchbrombach* in *Hesse Darmstadt*) accounts were directed, and an order was made for paying what should be found due, with interest at four per cent. The chief clerk, on the 20th *January*



person making the statement was not in a position to make it, whereas here the statements were received for the very purpose of establishing that relationship which was properly the only circumstance that would render them admissible.

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But supposing the relationship of the Respondents to the intestate to be sufficiently established, and the principal money to be payable to them, they are not entitled to interest. The letters of administration were granted to the nominee of the Crown for the use of the Crown, whose exclusive agent he was, the same as an escheator. As administrator for the Crown, he is not required to enter into any bond, to the Ecclesiastical Court; his duties and liabilities, therefore, cannot be tried by the rules which are applicable to ordinary administrators. The administrator for the Crown cannot be converted into a trustee for other persons. [Lord *Chelmsford* referred to *Turner v. Maule* (d).] But, for the dignity of the Crown, the administration would be granted to the Crown itself, exactly in the same manner as if there had been office found. Here the money was paid over by the administrator, Mr. *Mitford*, to the King's proctor under the authority of the Royal sign manual. All was then concluded. Yet, many years afterwards, the Court treats these funds as if they had an actual existence in the hands of Mr. *Reynolds*, who is Mr. *Mitford*'s and Mr. *Maule*'s successor, and he is declared to be personally liable. In the original decree of the Exchequer in 1831 there was nothing treating Mr. *Mitford*, his predecessor, as being personally liable. Yet Mr. *Reynolds*, in the character of his successor, is sought to be made so. The position of Mr. *Reynolds* is defined by the statute, he is merely made successor to prevent, in point of form, suits

(d) 3 De G. & Sm. 497.

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dition of his office and by the terms of his bond given to the Crown's proctor, to pay it over to the Crown. The administrator, nominee of the Crown, is in no respect like a private administrator. The only analogy to the proceeding here is to be found in the case of an escheat of real estate. There, if the heir-at-law afterwards appears and makes good his claim, the only judgment is *amoveas manus*, which carries in favour of the claimant all the rents and profits not actually received by the Crown, but those which have actually been received, are irrecoverable. That must furnish the rule for dealing with the present case.

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The orders here cannot be supported. There are three orders requiring the existing Sovereign, after three descents, to repay what was paid to a former Sovereign. There are no means to execute such an order, which is therefore bad, *Viscount Canterbury v. The Attorney General (g)*. In that case too, it was expressly held, that the existing Sovereign was not liable to make compensation for the damage to the property of an individual occasioned by the negligence of the servants of the Crown in a preceding reign. If, therefore, the payment to the proctor of *Geo. 3*, under the order of the Prince Regent, was erroneous, the Queen *Victoria* is not bound to afford compensation for that error. And at all events there is no justification for requiring the payment of interest.

Mr. *Rolt* and Mr. *R. Palmer* (Mr. *Simpson* and Mr. *Eddis* were with them) for the different Respondents.

The argument, that the Crown is not liable at all, is raised here for the first time, and, therefore, cannot be listened to. The only points argued in the Court below,

(g) 1 Phill. 306.

x x 4



may come in and shew that there has been a mistake in granting them, as any one may show that there has been a mistake in declaring who is next of kin. *Edgar v. Reynolds* (i) establishes that the person nominated by the Crown and on such nomination obtaining letters of administration, is to all intents and purposes administrator, like any other person; and if the fund is improperly paid over to the King's proctor, it must be repaid. The Crown has in such a matter no peculiar rights. *Bona vacantia* are simply goods, of which no one knows the owner, and, therefore, the Crown takes them as *ultimus hæres*. But if the true owner can be found, if there are really next of kin, the Crown has no right to them, and under those circumstances, the nominee of the Crown is just like an ordinary administrator. In such a matter the sentence of the Ecclesiastical Court, declaring who are the next of kin, is conclusive, *Barrs v. Jackson* (j). The obligation of the nominee of the Crown to pay over to the Crown is precisely the same as that of an ordinary administrator to pay over to the person entitled. That obligation can only bind the nominee of the Crown, and can only protect him where the Crown is lawfully entitled; where the Crown is not entitled, the payment to it is wrongfully made. As to the length of time which has elapsed, there is no Statute of Limitation in favour of an administrator. The 3 & 4 Will. 4, c. 27, s. 4, has been held not to apply to the residue of intestate's estates. An administration is a trust, and in *Knatchbull v. Fearnhead* (k) the executors of a deceased trustee, having had assets which would have been sufficient to answer a particular breach of trust by him, besides his other debts, were held chargeable with the liability to make good this breach of

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(i) 4 Drew. 269.

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prerogative, is not recoverable from Queen *Victoria*; secondly, money due from Mr. *Mitford*, even supposing it to be so, is not recoverable from Mr. *Reynolds*. This is a claim founded on personal liabilities—then, who is liable. If an administrator pays money to a wrong person, he is liable, but he must be pursued personally. So here the claimants ought to have sued *Mitford*, or the person who personally represents him, but instead of that they pursue, not his representative but, his successor, and join with that successor the existing *Attorney General*. In *Turner v. Maule* (l), the administrator alone was sued, and he alone had done what was the foundation of the suit. *Chambers v. Bicknell* (m) does not apply here, because of the difference between the grant of administration to a subject *durante absentia*, and one where the Crown itself (though of course the Crown in fact acts through an agent) is the administrator. [Lord *Cranworth*: Is it not expressly because there might arise rights which, though perfectly valid in themselves, could not well be enforced against the Crown, that administration is granted to some one else?] The grant is here made to the nominee of the Crown expressly by reason of the prerogative. It follows, therefore, that a claimant against the administrator for the Crown, is a claimant against the Crown.

Whom does the Appellant *Reynolds* represent? and what is the origin of his personal liability. By the effect of the statute 15 *Vict.* he represents *Maule*. But *Maule* was not personally liable. Any liability *virtute officii* no doubt descended, but there was none here, and no court of justice can make a public officer liable privately for what is done in his public capacity. The statute does not create any trust in the fund. When

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(l) 3 De G. & Sma. 407.

(m) 2 Hare, 536.



the Appellant had been an escheator the direction would have been *amoveas manus*, but that cannot be so with respect to money paid.

Assuming that the Appellant may be liable to pay the principal, interest cannot be demanded from him. Interest is payable on a breach of trust, but there is no breach of trust here. And again, the order is not against an individual, but against the Crown. In a court of law, interest is part of the contract, or may be given under the statute—in equity on the ground of contract, or against a trustee on the ground of duty, for negligence in not investing, or there may be given something in lieu of interest, such as profits of a trust-fund actually made by the trustee. These exhaust the grounds for giving interest. But none of them affects the case of money paid to the Crown. Even if remaining in the hands of the Crown it would not be liable to interest. It is not the duty of the Crown to invest the money, nor can it be given in the way of damages. When paid to the private purse of the Crown interest cannot be claimed for it. The Crown is not a trustee. [The *Lord Chancellor*: The privy purse of Queen *Victoria* would not be liable for the money; and the public revenue has not derived any benefit from it.] Resolutions of the House of Commons, and Acts of Parliament can alone affect the public revenue. That is impressed with a trust for public purposes. A private injury cannot be compensated for from the public revenue. [The *Lord Chancellor*: But there is a fund in court: on that the Plaintiffs relied.]

The *Lord Chancellor* (Lord *Campbell*) stated that their Lordships had come to the conclusion that though there was some evidence which had not been properly admitted, there was enough of evidence properly admitted to prove

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kin. He left nephews and nieces who were his next of kin, and in that character were entitled to the money. If the true state of things had been ascertained in the lifetime of King *George III.*, the obvious justice of the case would have required that he, or the Prince Regent acting for him, should refund the money which had been paid to him on a mistaken view of the facts. But the truth was not discovered in the lifetime of *George III.*, or of either of his sons, *George IV.*, or *William IV.* It was not finally established till the year 1859, *i. e.* nearly 40 years after the death of King *George III.*; nearly 30 years after the death of King *George IV.*, and considerably more than 40 years after *Mitford* had parted with the money. Who in these circumstances ought to be held responsible to the next of kin for the money which thus improperly came to the hands of the Prince Regent, acting for his father King *George III.*?

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It is very difficult to say on what ground her Majesty, or her Majesty's Treasury, can be considered as under any obligation to refund, or rather pay, the money. It never came to her Majesty's hands. The Crown is a Corporation sole, and has perpetual continuance. Can a succeeding Sovereign, upon the principle that the King never dies, be held responsible for money paid over in error to and spent by a predecessor, which that predecessor might lawfully have disposed of for his own use, supposing it to have rightfully come to his hands? Does the successor for such a purpose represent his predecessor? These are questions difficult of solution.

Let me put a case between subjects nearly analogous to the present, in which the Sovereign is concerned. Suppose a Bishop, lord of a manor; and that on the death of the copyholder, he claims a heriot, alleging such to be the custom of his manor, and suppose that



ing to his lands, were to convey them for his life to a stranger, in consideration of an annuity secured to him for his life, it would be absurd to say that such a settlement could create in the heir in tail, or the person claiming from him, any liability to discharge the debts of the preceding tenant in tail.

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On no analogy taken from disputes among subjects, can either the present Queen or the Treasury be deemed liable to the Respondents for the personal estate of the intestate received by King *George III.*

It is not, however, necessary to decide whether in a direct proceeding against the Sovereign (by petition of right, for instance), these analogies would govern the decision to be pronounced. The party here made responsible is not the Crown but Mr. *Reynolds*, and the true question is, whether he, as personal representative of the intestate, on the nomination of the Crown, can be held liable.

When a general grant of administration has been made, the administrator, whether entitled in his own right to the administration, or claiming only as the attorney of another, is fully competent to deal with the whole estate coming to his hands. He is bound duly to administer, and therefore when *Mitford* had paid all the debts of the intestate, he was bound to pay over the residue to the next of kin of the intestate, or, if there were no next of kin, to the Crown. He took on himself to act on the assumption that there were no next of kin, and paid over the balance in his hands to the Crown. The next of kin were entitled to treat this as a breach of trust, and if they had proceeded against him, they might have made him responsible. This is consistent with principle, and with the decision of Vice-Chancellor *Knight Bruce* in



administrator (and the Defendant *Reynolds* now, by statute, is put in the place of *Maule*), cannot be made responsible for any money which came to the hands of *Mitford*, and was by him improperly paid over to King *George III.* on the mistaken notion that the intestate left no next of kin at his decease.

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The question therefore is, whether the same rules and principles which would certainly be applicable in a dispute between subjects, are also applicable where the Crown is the party to whose hands the money has come.

The ground on which the Court proceeded is, that *Reynolds* was responsible. But on what principle can it be contended that there is any difference, so far as relates to the duty to be performed by the administrator, between administration granted to a nominee of the Crown and administration granted to the next of kin, or to any other person entitled to the grant? It is true that in the case of administration granted to a nominee of the Crown, the grant is expressed to be made for the use and benefit of Her Majesty, but that obviously means for the use and benefit of Her Majesty according to the rights and interests in the property of the intestate. This is manifest, for the grant is not made until the administrator has sworn faithfully to administer the goods of the deceased according to law. And the Statute of Distribution, 22 & 23 *Chas. II*, c. 10, s. 2, required every person obtaining administration to give bond to the Ordinary, conditioned among other things, to pay over the residue to such persons as the Judge granting the letters of administration should appoint, pursuant to the true intent of that Act, *i. e.* to the next of kin, as thereafter described; and though the late Act (15 & 16 *Vict.* c. 3) dispenses with such a bond in case of a grant to the solicitor of the Treasury, as nominee of the Crown, yet



must go the length of contending, that for such misappropriation *Maule* was responsible. This seems to me to be *reductio ad absurdum*.

But then it was said, that this liability of *Reynolds* has actually been declared by the Court, and we were referred to the Order of the Court of Exchequer, made on the 11th of *November* 1830, whereby it was ordered, that the suit which had become abated by the death of *Mitford* should be revived, and be in the same plight and condition against *Maule*, as it was in at the death of *Mitford*, “and that the Plaintiffs might have the same relief against *Maule* as they would have been entitled to against *Mitford* had he been living.” These latter words, it was argued expressly, made *Maule* liable for *Mitford*’s receipts. I cannot so interpret them. I think they meant no more than that the suit might proceed against *Maule*, as it might have done against *Mitford*, if living. I come to this conclusion because, on any other construction, the Court would have been making an order which it had no authority to make. The order was made on motion *ex parte* and without evidence. This was right if it was a mere order to revive, but very wrong if it is to be construed as affecting the rights of the party against whom the revivor was prayed; and wrong, let me add, not merely as a matter of form, but of substance, because it would be declaring an absent party liable to certain obligations without giving him an opportunity of being heard on the subject. The bill of revivor gave no intimation to *Maule* that anything was sought against him beyond mere revivor of the suit. The prayer was simply in the ordinary form, that the suit might be put in the same plight and condition as it was at the time of the abatement. When *Maule* had appeared, and the time for his putting in an answer had expired, the Court was

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In a case so unusual as the present, I have thought it right thus fully to state my view of the law, though on grounds which I will now shortly explain, I think the Appeal ought to be dismissed.

The Appellants, in their printed case, rest their Appeal on two grounds only; one applicable to the whole fund in dispute; the other to a part of it only, namely, the interest of the sum paid over by *Mitford* to the Crown.

The first ground, that which goes to the whole matter in dispute, is the alleged failure of the Respondents to make out their title as next of kin. This ground, as we intimated early in the course of the discussion before us, wholly fails. The pedigree of the Respondents is established beyond all reasonable doubt; and if this had been the only ground of appeal, the Appellants must have failed entirely.

But then comes the other question, How are we to deal with the second reason of appeal? The Appellants say, that even supposing the Respondents to have made out that they are the next of kin, still *Reynolds* is not on general principles of equity chargeable with interest; and the first question on this is, whether we are not entitled to take this as a submission to be charged with the principal sum? I think we are. It was admitted at the bar by the Appellants, that no question was raised in the Court below on the subject of the liability for the principal sum paid over to King *George III.* The argument below, assuming the pedigree to be established, was confined to the question of liability for interest; that being so, and no question being raised by the Appeal on that head, I think we ought not to attend to any argument which might have led us, if the point had been properly taken below, to consider that *Reynolds* was not

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satisfied, by the decision of this House, that if *Reynolds* had been all along the acting administrator, and not *Mitford*, he would have been liable for interest as well as principal.

When the decrees complained of were made, there was nothing to prevent the Respondents from bringing *Mitford's* representatives before the Court, for the late statute 23 & 24 *Vic.* c. 38, which by section 13, imposes a limitation on suits by next of kin, had not then passed. And if such a suit had been instituted, and the liability of *Mitford* and his assets had been, as it must have been, established, the advisers of the Crown would probably have considered that, without reference to strict right, it would have been inconsistent with the honour and dignity of the Crown to allow a former public servant, or his estate, to be made answerable, as he must have been made answerable, for money which he had paid over to a former Sovereign, and in respect of which payment he must of course have understood that he and his assets would be held harmless.

These are the grounds on which I presume the Crown has acted, and which in my opinion make it the duty of this House to dismiss the appeal.

Lord *Wensleydale*:

My Lords. I have had the great advantage in this case of perusing the opinion of my late noble and learned friend Lord *Campbell*, written, as it was his habit, shortly after the argument; and of being acquainted fully with the opinion, and the reasons in support of it, which my noble and learned friend has just delivered; and also with the reasons on which I believe my noble and learned friend who is to follow, has formed his opinion. I agree with all of them, that the Respondents have established very satisfactorily their right as next of kin,

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for the misappropriation of the personal estate of the deceased, by payment to the Crown, by *Mitford* the original administrator, as nominee on behalf of his late Majesty King *George III.*

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If this objection had been taken in an earlier stage, when the suit was instituted against Mr. *Maule*, I think the objection would certainly have prevailed. As administrator, as nominee of the Crown, he would not be liable for the *devastavit* of *Mitford* in paying over the assets to the Crown instead of reserving them for the next of kin.

But the question is, whether that objection can now be taken on behalf of the Appellant in the state in which the cause now stands. My late noble and learned friend Lord *Campbell* was of opinion that it could not. He thought that after the decree of the Equity Court of Exchequer, pronounced on the 12th of February 1831, which was not appealed from, and which left the question only of the relationship of the Respondents to be inquired into, and which decree was acted upon without objection till the 9th June 1859, this objection could not be taken. It would seem to be extremely hard upon the Respondents, if, finding the pedigree to be satisfactorily proved as alleged, we were now to dismiss the Bill telling them that they ought to have found out and sued the personal representative of Mr. *Mitford*, who wrongfully paid the money over to the Prince Regent or to take their remedy, a very doubtful one to say the least, against the Crown by a petition of right.

I perfectly agree with my noble and learned friend who has just addressed your Lordships, that the Order of Revivor of the Court of Exchequer of the 11th November 1830, alone cannot have the effect of fixing Mr. *Maule* with the liability for the misapplication of the assets, and that the Court of Exchequer had no authority to charge



observed that the rules of evidence adopted by our law in pedigree cases tend very possibly more to shut out the truth, and therefore to defeat the course of justice, than to assist it. But as hearsay evidence is admitted in these cases as an exception to the ordinary rules, on the ground of necessity, it is quite right to guard most carefully against the facility afforded by its admission for fabricating a false case. To admit the evidence is to promote the discovery of truth, to impose restrictions upon its admission is to prevent the intrusion of falsehood. It is, for instance, a safe and necessary precaution to require that before a declaration can be received, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. In consequence of the observations of the *Vice Chancellor*, I am anxious to show that my conclusion as to the right of the Respondents is founded entirely upon evidence of the admissibility of which there can be no doubt.

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The claim of the Respondents depended upon their establishing that the intestate was the son of *Johann George Köhler*, one of the sons of *Matthaus Köhler*, of *Rimhorn*, who was apprenticed to an iron founder, and ran away to *England*, where he enlisted in the royal artillery under the name of *George Keylor*. The history of the family of *Matthaus Köhler* is very distinctly traced in the certificates which are in evidence. He had three sons, *Johann Jacob*, *Johann Michael*, and *Johann George* (the alleged father of the intestate,) and two daughters, *Corduba* and *Gertraudt*. There are certificates of the birth of the three sons, and of the marriages of *Johann Jacob*, and *Johann Michael*, and of their deaths, and also of the marriages of the two daughters, and of the death of *Gertraudt*. And the relationship of the parties being thus satisfactorily proved by independent evidence, the



in 1814 he paid the balance of the intestate's estate into the Treasury for the use of his Majesty.

There can be no doubt that *Mitford*, by taking out administration and possessing himself of the personal estate of the intestate, became personally responsible to those who were entitled to this estate, that is, to the next of kin of the intestate. And if, after *Mitford* had paid over the money to the Treasury for the use of his Majesty, any persons had appeared and established their claim as next of kin, he would have been liable to repay the money to them, because he would not have properly administered the estate. Upon his death this liability would have been continued against his representatives. But as the money had, strictly speaking, been paid to the use of *George III.*, although *George IV.* had probably received it as Regent, he would not have been liable to refund it as King.

If nothing more had been done, therefore, after the accession of King *George IV.*, the only remedy which the claimants could have had would have been against the estate of *Mitford*. But, in 1827, *Mitford* being dead, administration was granted to Mr. *Maule*, as the nominee of his Majesty King *George IV.* Why was this done? If the estate had been fully administered by the payment to his Majesty's use, what necessity was there for any farther administration? Was not this equivalent to a declaration, that the payment was not to be regarded as a full and complete administration of the estate, but that *Maule* was duly to administer it upon the appearance of any rightful claimant.

The difficulty of the case, however, is not so apparent during the reign of *George IV.*, as after the accession of King *William IV.*, and of her present Majesty. If the claim could be maintained only against the sovereign, it

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I cannot help thinking, that he had effectually precluded himself from taking any objection to his liability to the claimants if their title had been established. It seems to me to be unnecessary to consider the claim as against the Sovereign, because, by the proceedings, *Maule* became liable to the same extent as *Mitford*, and *Mitford* was clearly responsible to the next of kin of the intestate for the due administration of the estate.

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Then comes the Act of the 15th year of Her Majesty, which, after reciting that administration of the effects of several intestates had been granted to *Maule* as the nominee, and for the use, of the Sovereign, and many of such estates had not been duly administered, enacts “that all actions, suits, informations, and other proceedings by and against any solicitor of the Treasury, as administrator at the time of his death, shall continue and may be proceeded with, by, in favour of, and against the succeeding solicitor, in like manner.” Under this Act *Mr. Reynolds* was introduced into the suit.

It is clear, that the estate of the intestate must be considered as being one which had not been duly administered in the terms of the Act, because *Maule* could only have duly administered by distributing to the next of kin. And as the suit was, by the provisions of the Act, to continue against *Reynolds* in like manner as against *Maule*, it seems to me that it would not have been competent to *Reynolds* to say, that he was not bound to administer the estate, as the statute imposed upon him the same obligation as *Maule* was under, duly to administer, and the same liability as to the suit of the claimants; *Reynolds*, however, urged no objection of the kind, but satisfied himself with taking exceptions to the *Master's* report, as to the sufficiency of the evidence to establish the title of the



themselves of opposing claims under precisely similar circumstances, and that it has never occurred to successive Attorneys-General that the position, now for the first time assumed, was maintainable. The cases of *Turner v. Maule*, and *Edgar v. Reynolds*, which were mentioned in the course of the argument, were like the present case, as to the granting of the administration, and paying over the money by a former administrator, before the claim was made; and yet it did not appear to be doubted in any of them that on the appearance of the next of kin the fund constituting the intestate's estate was in existence to satisfy the claim when established. And it may be observed, in confirmation of this view, that under the Act 15 Vict. c. 3, the payment of the money belonging to an intestate's estate into the Consolidated Fund, which is substituted for its ultimate destination to the use of Her Majesty, is no impediment to the claimant's establishing his title and obtaining restitution. Whether the objection which I have been considering can be raised since the passing of this Act, it is unnecessary to determine.

Upon the subject of interest, I will only observe that it was paid without objection in the case of *Turner v. Maule*, and that the case of *Edgar v. Reynolds* is a direct authority in favour of the claimant's right to it.

I am therefore of opinion that the orders appealed from are correct, and that they ought to be affirmed.

Orders affirmed, and appeal dismissed without costs.

Lords' Journals, 24th July 1861.

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effect of the usage so proved, and that such custom furnished an answer to the action. The jurors found the custom in fact; and he directed a verdict for the Defendant. To this direction the Plaintiff excepted, but the exceptions were disallowed by the Court of Exchequer Chamber, and judgment given for the Defendant. The Plaintiff now brought up the judgment to this House.

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Sir *H. Cairns* and Mr. *Manisty* (Mr. *T. Jones* was with them) for the Plaintiff in error.

It is admitted on the record, that the act complained of is an act of waste, unless it can be defended by the alleged custom. That custom cannot be good; to be so it ought to have four requisites, as stated in the *Tanistry* case (*a*) “first, reasonable at its beginning; second, certain, and in no wise ambiguous; third, continuous without interruption; fourth, subject to the prerogative of the King.” Other requisites to constitute a good custom are stated in *Broom’s Legal Maxims* (*b*). A custom for a customary tenant of a manor which had coal mines lying under the freehold lands of other customary tenants, to get coals, leave them on the lands, not saying how long, and to take away in carts and waggons part, not saying how much of such coals, was held to be bad as being uncertain and unreasonable, *Broadbent v. Wilks* (*c*). For the same reason in *Hilton v. Lord Granville* (*d*), a custom to dig in mines near the foundations of the Plaintiff’s dwelling-house, so as to endanger it, was held to be bad. *Tyson v. Smith* (*e*) declared the same principles, and applied them to the custom there set up, and as it appeared in that case

(*a*) Sir J. Davis, Rep. 32.

(*b*) pp. 824 to 829, 3d Edit.

(*c*) Willes, 360.

(*d*) 5 Q. B. Rep. 701.

(*e*) 9 Ad. & Ell. 406.



of fact, putting the validity of the custom entirely upon the ground of its being reasonable.

It is said that a custom for the tenants to work mines is good, but the proposition in that general form cannot be supported; it must be subject to this restriction, that though such a custom may possibly exist, it can only do so when it has all the incidents of a good custom. In the *Bishop of Winchester v. Knight* (o), a custom to take away copper ore was set up; it was sent to law to be tried, and the result was unfavourable to the custom. That case has been misunderstood; it has been treated as an authority for saying that a custom for a customary tenant to cut timber might be good; but first, that supposition only arises, not on the words of Lord *Cowper*, but on the interpretation put upon them, and next that was not a case of mere copyhold, but of customary freehold, where the lord is the mere instrument for passing the land from one tenant to another, but the right to the land is in the tenant himself. In *Gilbert's Tenures* it is said (p), "it seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines, nor the lord dig in the copyholder's lands, for the great prejudice he would do to the estate." [Lord *Wensleydale*: He cannot do it without a special custom; it does not follow that he can do it with any custom.] It does not. In *Scriven on Copyholds* (q), it is said, that a copyholder of inheritance, whether for life or years only, has a possessory interest in mines or trees, but that he may have a proprietary right in mines by immemorial custom; but that without such custom, the right of property in the mines is in the lord, and it follows, that in the absence of any particular usage, neither the tenant without the

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(o) 1 P. Wms. 406.

kins, 425.

(p) P. 328, 5 Edit. by Wat-

(q) 4 Edit. 427.



tive of the subject-matter of the grant, cannot be set up by any usage. Even if the grant could be produced *in specie*, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." The claim there set up for the lord was rejected. That case is all the stronger for the Plaintiff here, for there must be some customs which would be good for the lord, who was the original proprietor of the soil, that would not be good for the tenant, who is only his grantee.

There is no analogy between this case and that of one where the tenant claims to cut trees on the copyhold land: trees are but the produce of the land, and may be removed; but here the claim is to take away the land itself. And the custom to cut trees may have had its origin when it was desirable to clear the land, and may be limited to removing the excess. Nor can the case of quarries be referred to as similar to the present, for the custom to take stone from them must be strictly proved; and when evidence of the custom is given, it must be shown to have all the requisites of good custom. *Scriven* (y) doubts whether any custom to take away gravel and loam from the waste can exist, unless it is shown to be reasonable. And he asserts that for a custom to open a mine or a quarry, there must be the consent of the lord and the copyholder (z). But in neither of these matters has it been shown that there is any authority for the proposition that a custom to take trees, or minerals and stone, without stint, is a good custom; yet that is what is claimed here. The assertion made here, that the clay is the property of the tenant, is a mere piece of reasoning in a circle: it can only be his property if the custom

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(y) On Copyholds, 522, 4th edit.

(z) Id. 433.



the clay is not the destruction of the tenement; it may be a benefit to it. It is not because a custom diminishes the value of the lord's estate, that it is therefore bad. A tenant may commit waste, for he may cut trees, which is waste, and he may dig for minerals. There is no difference between digging for minerals and digging for clay. The argument on the other side would render the clay valueless; for the lord could not take it because of the tenant's right, nor the tenant take it because of the lord's right. That is a result which the law does not favour, and therefore in *Rutland v. Gie* (b), it was held that a person might open a lead mine on his glebe, for otherwise all the lead mines in the glebe of *England* would be unproductive. There is no distinction between trees and minerals. Trees are part of the freehold, part of what will escheat to the lord. Clay is in the nature of a mineral.

The *Bishop of Winchester v. Knight* shows distinctly that a tenant might cut timber, and implies that he might dig for ore; and the only issue granted there, was to ascertain whether there was a custom to take the ore, which assumed that there could be such a custom valid in law, the issue being only granted to try the fact. The final judgment proceeded on the fact that no such mines had been before discovered on the land, and therefore there could be no custom as to such mines; but the case showed clearly that if in fact there had been such mines, the law would have recognised the tenant's right to work them.

There is a great distinction between copyholds of inheritance and mere customary copyholds. In the former, the fee is in the tenant; in the latter, it is in the lord. But *Stephenson v. Hill* (c) shows that copyholds of inherit-

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(b) 1 Siderf. 152.


(c) 3 Bur. 1273.



manor, would be unreasonable, as tending to the destruction or annihilation of those lands.

I cannot attribute much weight to this argument. It is true that a custom to be valid must be reasonable. It is not easy to define the meaning of the word "reasonable" when applied to a custom regulating the relation between a lord and his copyholders. That relation must have had its origin in remote times by agreement between the lord as absolute owner of the whole manor in fee simple, and those whom he was content to allow to occupy portions of it as his tenants at will. The rights of these tenants must have depended, in their origin, entirely on the will of the lord, and it is hard to say how any stipulations regulating such rights can, as between the tenant and the lord, be deemed void, as being unreasonable. *Cujus est dare ejus est disponere*. Whatever restrictions, therefore, or conditions the lord may have imposed, or whatever rights the tenants may have demanded, all were within the competency of the lord to grant, or of the tenants to stipulate for. And if it were possible to show that before the time of legal memory, any lawful arrangement had been actually come to between the lord and his tenants, as to the terms on which the latter should hold their lands, and that arrangement had been afterwards constantly acted on, I do not see how it could ever be treated as being void, because it was unreasonable.

In truth, I believe, that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right

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That such a custom would be good as to copper ore raised and sold by the tenant, was decided by Lord *Cowper* in the *Bishop of Winchester v. Knight* (1), for though the tenant there was not strictly a copyholder, yet he was a mere customary tenant, the freehold being in the lord; and in that case, on a bill by the lord for an account of the copper ore raised and sold by the tenant, Lord *Cowper* directed an issue to try whether there was such a custom as that insisted on, which he could not have done if the alleged custom would be void as being unreasonable. I cannot distinguish that case in principle from the present. It was said that by removing all the clay the land would be rendered unfit for any useful purpose, whereas copper ore might be removed without ultimately damaging the surface. But clay is not the only component part of the soil adapted for profitable cultivation, even if a custom would be bad which would lead to making the land useless for agricultural purposes.

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The custom here insisted on is not a general custom for all manors, but only a custom for the particular manor of *West Derby*; and it may be that in that manor clay was, or was supposed to be present, in so excessive a quantity, that its removal would tend to benefit and not to impoverish the soil. The custom would not warrant the removal of soil consisting of mixed portions of clay, chalk, gravel, and vegetable mould; and it may be that the lord considered that the removal of pure clay would increase the value of the soil which would remain.

I have gone into these particulars, but I by no means think it essential so to do. We may now be unable to discover what were the grounds which led to the establishing of the custom. It is sufficient for me to say that

(1) 1 P. Wms. 406.



the owner of the soil originally, could have given by express grant such a power, and even a much larger power, to his tenants; but then when there is no express grant, but one which is sought to be implied by usage, as a custom is, it is a condition required by law, that the custom should not be unreasonable; otherwise the prevalence of the use is to be referred to the ignorance or carelessness of those whose property is affected by its exercise, rather than to a grant.

Thus there is no question but that the custom for a copyholder to take an unlimited quantity of turf from the lord's waste for the improvement of his copyhold tenement is unreasonable and void. *Wilson v. Willes* (n). So a custom for the lord to enclose generally, without leaving a sufficiency of common, is void: *Arlett v. Ellis* (o). Yet in these cases, and in many others, the lord might, without doubt, have made a valid grant in the one case, or reserved a valid right in the other. So unquestionably the lord might grant a right to each copyholder to remove the surface, and take away the whole stratum of clay, however deep and extensive it might be, and however much injury its removal might cause to the copyhold tenement, even though there was no countervailing benefit by its removal to that particular tenement or any tenement in the manor, either directly or indirectly, by the use of the bricks manufactured from the clay. Where a right is claimed by a copyhold tenant on the adjoining land of the lord, or on the land of the lord which he himself enjoys under a grant from the lord, the right is equally claimed by custom, and is equally void if the custom is unreasonable, as it would be equally valid if it had been made the subject of an express grant.

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(n) 7 East, 121.

(o) 7 Barn. & Cres. 346.



was admitted that there might be a valid custom for a copyholder of inheritance to work mines, to dig and take clay, or to cut down and carry away trees, but that it was the extent to which this custom was alleged which made it unreasonable; and with respect to trees it was said that although it must be conceded that a custom to cut down all trees growing on the copyhold tenement might be good, a distinction must be drawn between them and such an interference with the soil, as the removal of clay or minerals, because it might be necessary to clear away trees for the purpose of cultivation, or because they are perishable, or are in their nature renewable. The last reason, however, involves an inaccuracy, for the trees themselves are not renewable, but fresh trees may be planted to supply the place of those which are cut down, and the other two reasons might support the distinction, if the custom were confined to the suggested occasions; but evidently they will not afford a satisfactory explanation of a custom to cut down all trees, and to dispose of them at the will and pleasure of the tenant.

In the course of the argument, I asked if the custom to take clay or to work mines might lawfully exist (as it was admitted it might), in what manner such a custom would be likely to have originated, and whether, assuming that copyholds sprang from tenure in pure villenage, it was at all unreasonable to suppose that the lord, in consideration of the performance by the tenant of the villein services connected with his tenure, might give the tenant the right to take away for his own benefit a portion of the lord's soil within the tenement. To this it was answered, that this might be so to a defined and limited extent, but that the custom here claimed went to the entire destruction of the copyhold tenement. It is difficult to understand in what sense a custom to take the

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quired only by grant or license from the lord. The rights of the lord over the copyhold tenement must have arisen from reservations for his own benefit, made by the absolute owner of the property, who had power to transfer it with such qualifications as he pleased. He might reserve to himself upon the original grant or license, any right which would not be totally inconsistent and incompatible with the existence of the interest granted.

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Thus, in *Bateson v. Green* (*q*), the validity of a custom for the lord to dig clay pits on the waste to any extent, and without leaving sufficient herbage, was established, because there was nothing unreasonable in supposing that the original grant of the common was expressly made subservient to the exercise of the lord's right to take away the soil from his own lands.

But in *Broadbent v. Wilks* (*r*), a custom for the lord, the owner of coal mines within the manor, to dig the mines, and lay the rubbish in heaps near the pits, upon the surface of land being customary tenements and parcel of the manor, there to remain and continue at the will and pleasure of the lord, was held bad because the right which was claimed involved the destruction of the whole profits of the land, and it would, therefore, be unreasonable to presume a reservation so entirely inconsistent with the grant of the tenements.

On the other hand, with respect to rights conferred upon tenants, there is nothing unreasonable in supposing that the lord should have authorised the tenant to appropriate portions of the soil of the tenement to his own use, as the trees, or the minerals, or the clay, but it is most unlikely that he should have given to his tenants in general rights or privileges, and at the same time have

(*q*) 5 T. R. 411.

(*r*) Willes, 360; 1 Wils. 63.



The NEW BRUNSWICK and CANADA RAIL-  
WAY and LAND COMPANY and the Direc- }  
tors thereof - - - - - } *Appellants.*  
JOHN C. CONYBEARE - - - - - *Respondent.*

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Feb. 20, 21,  
24, 25.

A barister who is a party in an Appeal Case must elect to conduct his own case or to have it conducted by counsel.

*Contract.*  
*Misrepresentation.*  
*Fraud.*  
*Pleading,*  
*Costs,*  
*Barrister,*  
*Practice.*

Where an application is made in equity to set aside an executed contract, on the ground of the Defendant having stated what is false, or concealed what ought to be disclosed, the circumstances alleged must show that his conduct amounts, in equity, to fraud.

The bill must show not merely of what the alleged fraud consists, but how it has been effected.

A company is as much bound by the acts of its authorised agent as is an individual.

Reports made by the directors of a company, and afterwards adopted and circulated by the company, are binding on the company as statements made by the authority of the company itself.

If such reports are afterwards shown to have been the immediate cause of a purchase of shares in the company, and to have been untrue, the company cannot retain the contract or the money thereby acquired. But where the reports are mere general statements as to existing or anticipated profits, and are accompanied by documents which afford the means of testing the accuracy of what is so stated, the purchaser of shares having had the opportunity of so testing it, cannot set aside a contract once executed.

*Per Lord Cranworth.* If the ground alleged for rescinding a contract, executed, to become a shareholder in a company, is a representation that the company had a good title to certain land, whereas it was not a good title but a defeasible title, the opinion of the Court, that the title was doubtful is not sufficient to warrant the Court to interfere with regard to such a contract.

A., in *September* 1858, was desirous of purchasing shares in a company for making a colonial railway, and applied at its offices for information on the subject. The Secretary gave him certain reports issued by authority of the directors. In one of them was this passage, "The system of payment adopted in the province involves the liquidation of every claim once in six weeks ; so that when the certificate of the engineer, and the accounts forwarded by the manager are settled, the capital account is virtually closed up at that time." In fact the accounts were made up once in six weeks, but not discharged ;



previously in existence a company called the “*St. Andrew’s and Quebec Railway Company*,” constituted under an Act of the *New Brunswick* Legislature. The memorandum of the Association of the Appellants described their objects to be to accept a transfer of the undertaking of the *St. Andrew’s and Quebec Company*, “to purchase all the lands, property, rights, and expectancies of the class *A*. shareholders” of that company, to carry the undertaking in all its branches into execution, to appropriate the said lands, &c., among the shareholders of the company, to acquire and appropriate any other lands, “to advance the funds or take the shares in the said railway company and class *A*. to enable the said company to carry on the said undertaking until the shares shall be transferred to the company hereby established, and to obtain Acts of the Imperial Parliaments and of the Legislative Council and Assembly of New Brunswick on that behalf.”

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At the time of this proposed transfer affairs stood thus. The *St. Andrew’s and Quebec Company* had been in 1836 incorporated by an Act of the Provincial Legislature (6 *Will.* 4, c. 31), which, after granting the company divers privileges, contained a clause (cl. 25) to the effect that the company, to entitle itself to the privileges, benefits, and advantages thereby granted, must make and complete the railroad from *St. Andrew’s* to the boundary line of *Lower Canada* within 15 years from the date of the Act.

Another Provincial Act in 1847 (10 *Vict.* c. 27) repealed the former Act, granted similar privileges, and contained a clause to the effect that the company, to entitle itself to the benefits of these privileges must complete the railroad from *St. Andrew’s* to *Woodstock* within 10 years from that time.

By another Provincial Act passed about the same time



granted to the company first repealed the 3rd cl. of the 10 *Vict.* c. 84, and then enacted that “if the part of the railroad between *St. Andrew’s* and *Woodstock*, and also a branch to the river *St. Croix* at or near the *Ledge* (so called) in the parish of *St. Stephen* in the county of *Charlotte*, be not completed and in full operation, within the space of four years from the time when this Act comes into operation, all and every the grants of land and the rights and privileges conferred by the several Facility Acts relating to the company shall be utterly null and void, and the land and privileges shall revert to” the Crown. The 7th section of this Act was in these terms: “The several grants and appropriations of Crown lands respectively made to or for the benefit of the company are by this Act confirmed, and shall be valid and effectual to all intents and purposes whatsoever.” The 10th section provided that nothing in the Act should extend the rights of the company under any Act of Assembly then in force, nor enlarge the powers or privileges already granted, or increase the provincial liabilities, except to extend the time for the completion of the railway.

On the 12th *April* 1856 (ratified by the Queen in Council 25th *August* 1856), an Act (19 *Vict.* c. 70) was passed, intituled “An Act in addition to and in amendment of the Act relating to the *St. Andrew’s* and *Quebec* Railroad Company.” It recited that the stock of that company had been divided into classes *A.* and *B.*; that the *A.* shares had been paid up, but that the *B.* shares had not been paid up, and that the company for securing the completion of the line to *Woodstock* was desirous to transfer its rights and privileges, &c. to another company, which, by Act of the Province, might be allowed to accept the transfer, and then enacted the permission to transfer, and conceded to the transferee company the

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payment adopted in the Province, involves the liquidation of every claim once in six weeks; so that when the certificate of the engineer and the accounts forwarded by the manager are settled, the capital account is virtually closed up at that time, and in this way arrears of every kind are most effectually prevented." "The directors are glad to state that there is not the slightest probability of any rival scheme being carried out in *New Brunswick*. Your railway will, therefore, be the great trunk line of communication between this country and the Canadas." To this report was appended a balance-sheet, which appeared to declare a balance in favour of the company, of 2,689 l.

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In *July* 1858, another report, also of a satisfactory kind, was made, in which the directors said that "their farther information leaves them no reason to doubt their being able to finish the line within the capital and the time required for its construction." They reported the confirmation of the grant of the 20,000 acres of land, and the grant of 30,000 more then under survey. The balance-sheet showed 1,466 l. in favour of the company.

On the 27th *April* 1858, the company laid a case before Mr. *Bullar* upon the subject of the forfeiture clause on the non-completion of the line, and on 7th *May* 1858, Mr. *Bullar* wrote, "I am of opinion that under the Facility Act, 19 *Vict.* c. 69, s. 2, and notwithstanding sec. 7 of that Act, and the Act of 19 *Vict.* c. 70, the land in question is liable to forfeiture if the line to *Woodstock*, and the branch to the River *St. Croix*, be not completed and in full operation by 21st *August* 1860."

In *August* 1858 the Respondent, being desirous to purchase some *A.* shares, applied at the office of the company in *London* for information. He had a conversation with the secretary, which was variously represented



be no rival line, and that the company had an indefeasible title to the land granted by the Government, did not amount to misrepresentation, and could not constitute fraud. The case did not at all resemble that of *Edwards v. M'Leay* (d).

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But even if there had been any misrepresentation, it was not made under the authority of the directors, and consequently the company could not be liable, *Ernest v. Nicholls* (e).

The *Lords Justices* did not think the charge of misrepresentation made out, and yet they gave judgment for the Plaintiff on the ground of what were really no more than ordinary errors or expressions of opinion in the reports. What was there stated was not false, or, when stated, was not known to be false. If it turned out afterwards to be erroneous that would not furnish a ground for rescinding the contract.

Then as to costs, the *Vice-Chancellor* thought, that the charge of misrepresentation had wholly failed, and so dismissed the bill, but he dismissed it without costs. That was wrong.

Mr. *G. L. Russell*, on the first day of the hearing, said, that he appeared for the Respondent, and suggested that Mr. *Conybeare* appeared as his junior in the cause. He referred to *Newton v. Ricketts* (f), where a party appeared as counsel at the bar of this House.

The Lord Chancellor (Lord *Westbury*): Certainly. But not both as party and counsel. The Respondent must elect to argue in person or not. There cannot be a mixture of the two characters.

(d) G. Cooper's Rep. 308 ;  
2 Swanst. 287.

(e) 6 H. L. Cas. 401.  
(f) 9 H. L. Cas. 262.



and *Ingram v. Thorp* (*k*) strongly confirm that doctrine. Though the party to whom the statements are communicated had equal means of knowing the truth, that will not be an answer, *Reynell v. Sprye* (*l*). In *Price v. Macaulay* (*m*), there was a representation that property advertised to be sold yielded a yearly rental of 60 *l.*; the fact that the continuance of that rental depended in part on a license revocable by third parties was not stated, and the suppression of that fact was held to release the vendor from specific performance of his contract of purchase, &c. The present Appellants had themselves been refused enforcement of a contract on that very ground in the *New Brunswick &c. Company v. Muggeridge* (*n*). There is little difference between misrepresentation and concealment. They both lead and are intended to lead to a false impression. *Wilde v. Gibson* (*o*) enunciates the principle to be applied to cases of this kind, though there the facts did not call for its application. Here, too, one representation was known to be false, namely, that the company had an indefeasible title to the land, for the counsel consulted by the directors had expressly given his opinion that the title was not indefeasible. The Appellants were bound to communicate that opinion when they made a representation to an opposite effect. [The *Lord Chancellor*: In “Vendors and Purchasers,” it is said (*p*), “Moral writers insist that a vendor is bound, *in foro conscientiæ*, to acquaint a purchaser with the defects of the subject of the contract,” and *Cicero De Officiis* (*q*) is referred to. But the learned author goes on to say: “Our law does not entirely

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(*k*) 7 Hare, 67.

(*l*) 8 Hare, 222.

(*m*) 2 De G. M. & Gord. 339.

See *Leyland v. Illingworth*, 2 De G. F. & Jo. 248.

(*n*) 1 Dr. & Sm. 363.

(*o*) 1 H. L. Cas. 605.

(*p*) p. 1.

(*q*) Bk. III. c. 13.



*Lords Justices* giving relief to the Plaintiff by setting aside an executed contract, and directing certain conveyances consequent upon the contract to be rescinded, and declaring that the company is bound to take back the shares which had been sold to the Plaintiff.

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The original decree in this cause was made by Vice-Chancellor *Stuart*, dismissing the bill, but without costs. The *Vice-Chancellor* was of opinion that no one of the charges contained in the bill had been substantiated. The case, then, went by appeal before the *Lords Justices*, and was heard at great length and on new evidence. From the judgment which was given, it would appear as if the *Lords Justices* concurred in the conclusion of the *Vice-Chancellor* on all points save two; on which two there is certainly no very definite expression of opinion on the part of those learned judges.

One of those points appears to be this; the *Lords Justices* seem to have considered that certain reports, dated in *December* 1857 and in *July* 1858, had been handed over by the secretary of the company to the Respondent, with a representation, either direct or indirect, that those reports contained an accurate statement of the then existing condition of the company; they having been given by the secretary to the Respondent in *September* 1858, about a twelvemonth after the making of one report, and three months after the making of the other.

The other point on which the *Lords Justices* also do not express anything like a decided opinion is an alleged representation made by the secretary of the company to the Plaintiff, that the company had an indefeasible title to certain lands; upon which the *Lords Justices*, in effect, say, that they are unable to tell whether the company had a defeasible or an indefeasible title, but that they find that the company has been advised by an eminent counsel



amounts to this, that the misrepresentations on which the Plaintiff relies were contained in the two reports of *December* 1857 and *July* 1858, given to him by the secretary, to which I have already adverted. The other part of the case consists of a narrative of what was said or done by the secretary, and what passed between the secretary and himself on the occasion of two distinct interviews which he had with the secretary at the office.

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In the first place, with regard to the reports that were produced to the Plaintiff by the secretary, I certainly am not at all disposed to advise your Lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and those reports are afterwards industriously circulated, misrepresentations contained in those reports must undoubtedly be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding on the company.

Neither, my lords, do I think it would be at all expedient to question *this* conclusion, that if those reports having been industriously circulated shall be clearly shown to have been the proximate and immediate cause of shares having been bought from the company by any individuals, or subscribed for by any individuals, and they are proved to have been untrue, it will be impossible consistently with the principles of equity to permit the company to retain the benefit of that contract, and to keep the purchase-money that has been so paid.

There may be a very different consideration applied to the same transaction in a Court of Law, and in a Court of Equity, because when an attempt is made in a Court of Law to render a party liable to damages for certain con-



But, my Lords, it may not be necessary to rest any decision of your Lordships upon such considerations, because I will now beg your attention to the nature of the representations as alleged in the bill, and I think that you will see that it would be impossible, upon the most accurate sifting of the allegations in the bill and the evidence in support of it, to arrive at the conclusion that there was any material misrepresentation made to the Plaintiff which induced him to enter into the contract in question.

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My Lords, these representations are divided, as I have already said, into those that are contained in the reports and those that were involved in conversations with the secretary. The representations contained in the reports, as stated by the Respondent, appear to be, first, a conclusion that he derived from one of the reports, that there were no liabilities of the company, because the Directors were in the habit of paying for everything with ready money.

Now that is an interpretation which he puts upon a particular passage in one of the reports, a passage which, it appears to me, he has entirely misconstrued, for, without entering into any very accurate investigation as to the meaning of the word "liquidation" your Lordships will at once see, by referring to the passage in the report, that it is utterly impossible that any man could have understood it as implying that the accounts were paid in *New Brunswick* every six weeks. The object of the passage is clearly this, to show to the shareholders that the amount of the liabilities of the company for the works in *New Brunswick* was ascertained every six weeks. And in the next line, after speaking of the liquidation, this remark is made: "So that when the accounts are sent to *England* and settled there will no longer be any debt."



*September* 1858. My Lords, I must here particularly beg your Lordships' attention to the fact that there is no charge whatever in this Bill that when these reports were given to this gentleman they were accompanied by any definite or certain statement by the secretary that the representations contained in those reports were accurate and truthful representations of the then existing state of circumstances.

What the Appellants say in answer to that particular charge appears to be true, namely, that in the month of *December* 1857, when the report was made and issued, the receipts of the line did in reality exceed the working expenses. Therefore, in the absence of any allegation or proof that this gentleman was led distinctly to put faith in that statement as a statement repeated again in *September* 1858, I cannot advise your Lordships to rest at all upon that particular allegation.

Then, my Lords, there is another statement contained in these reports, a general statement that there was no probability of any rival line being carried out. Why, my Lords, that is a matter as to which every individual who hears such a statement would of necessity understand that it was a mere conclusion of general opinion. That is not a misrepresentation of fact, which must exist before you can found upon it as a title to relief. I dismiss that part of the case, therefore, as something which, whether it be true or false (but it is not shown to be false), would be merely a speculative matter of opinion, constituting no ground whatever upon which a charge of misrepresentation can be founded.

My Lords, there appears another statement, which is partly matter of report and partly rested upon an alleged conversation with the secretary, namely, the statement which the Respondent brings forward that he was assured

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by the broker that he understood that some of the shareholders refused to pay the calls, denying all liability, and disputing the company's power to enforce them. It might be very true, therefore, that the Company at that particular time was under some financial difficulties. But there is no case made by the Bill that there was either concealment from the Plaintiff or misrepresentation made to the Plaintiff, so as to enable him to come here and allege that he was thereby induced in that state of circumstances to purchase shares. The allegation in the Bill is limited only to the competency of the capital for the completion of the line; and the contrary to that is not, as I have already observed, anywhere alleged.

There remains the more important consideration on which the opinion of the *Lords Justices* (given, nevertheless, in the indefinite manner I have already described) mainly appears to be rested. The conclusion at which the learned Judges arrived appears to be this, that the secretary having produced to this gentlemen certain grants of lands which were *ex facie* absolute and indefeasible, must be taken by the production of those grants to have represented to the Plaintiff that the company had an indefeasible title to those lands. My Lords, I think that may be undoubtedly regarded as a strong conclusion, merely from the circumstance of the production of those grants. The other part of what passed appears to have been this: that there was a certain Act of the Provincial Legislature passed in the 19th year of *Vict.*, which was, in point of fact produced, with other Acts, to the Plaintiff, at the time of his first interview with the secretary at the office of the company, but which Act was not included in a collection of the Acts made by the company anterior to the time of the passing of that Act of the 19th of Her Majesty's, and which collection (to adopt

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to enable Appellants to go on with farther works. It is perfectly clear, therefore, that this grant of land was made for a consideration, which, in the view of the Legislature, must be taken to have been already paid by the Appellants, when the Appellants had expended so much money upon the work; and it would be impossible to hold, consistently with any principle of ordinary justice, that if the Appellants should have failed ultimately to complete the line, the Legislature would be entitled to resume the particular lands requisite for the construction of the line, and that the Legislature would be entitled to resume also the lands that had been previously granted in consideration of the price actually paid by the Appellants.

Accordingly, my Lords, the subsequent Acts of the Legislature must undoubtedly be construed with reference to this broad principle, and this reasonable rule as to the intention of the Legislature. And if your Lordships look at them with this view, it is perfectly clear when we come to the Act of the 19th of the Queen, that it intended to repeat and preserve the original right given by the 10th of the Queen to resume the land along the track of the railway. But by the 7th section, it confirms all those grants of land made by virtue of the subsequent Acts of the Legislature, which were not contemplated, nor was there any power to make them, at the time when this statute of the 10th *Vict.*, containing the original power to resume, was passed. I take it, therefore, to be perfectly clear that the condition of resumption expressed in the 19th *Vict.*, is a condition intended to repeat the original proviso or condition contained in the Act of the 10th *Vict.*, c. 84.

Now, my Lords, of course in dealing with this particular matter, we deal with it only upon the materials that are presented to us by these contending parties, and any opinion

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These are all the allegations that are to be found in this bill; and what is more, independently of the statements in the bill, these representations which the Respondent has made with reference to this case, appear to me not to be warranted as to any conclusion of fact by the evidence before us. I am obliged, therefore, to say that I cannot, as far as my opinion goes, hesitate with regard to the decree that ought to have been made in this case. I find here the company charged with fraud through the medium of its directors, for if any fraud has been perpetrated, it must have been perpetrated by the directors. If the secretary made false representations, they were either prompted or have been ratified by the directors. Yet the extraordinary character of the judgment which is the subject of this appeal is this, that the *Lords Justices* acquit the directors altogether, but find an immaterial being, namely, an incorporated company, guilty of fraud. My Lords, I think the conclusion originally ought to have been that there was no ground for imputing to the directors fraudulent representation or fraudulent withholding of any material fact; and I believe it to be essential in the administration of justice, that when a charge is made involving the imputation of fraudulent misrepresentation or fraudulent concealment, if that charge fails, it ought to fail with the ordinary penalty of the Court, directing the party who makes it without ground, to indemnify his antagonist in costs.

I must, therefore, submit to your Lordships, that there was no satisfactory reason for the *Vice-Chancellor* departing from the true principle of the Court, in dismissing this bill without costs. It is undoubtedly the wiser rule to let the costs follow as an incident to the decree. If there are grounds warranting the refusal of the relief sought by the bill, it is very difficult to see on what

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accuracy of the learned Judge who mainly pronounced the judgment in the Court below, I am very much surprised at the principle as there promulgated by him. The charge (so far as it is correctly stated in the bill) being, that the Plaintiff had been induced to enter into this contract by a fraudulent representation that there was a good title to the land, whereas in fact there was not a good title; the ground on which the *Lords Justices* have proceeded is this, not that there was not a good title, but that they were not satisfied upon that subject, and that therefore it was a sort of doubtful title which would warrant their interposition. Now, I must take the liberty of saying, that however that doctrine would have applied in an executory contract, it is in my mind totally inapplicable where the contract is executed, and where the Court is asked to set aside the contract upon the ground of misrepresentation.

But however, for the purpose of the few observations which I am about to make, I will assume that this representation had been established to be a fraudulent one on the part of the directors. The question as to the doctrine of the Courts, which was in some degree discussed, I will not say called in question, in the argument was this:—Whether the directors can be so far considered as the representatives of the company, as that a fraud on their part should for any purposes be deemed the fraud of the company, and several cases were referred to in which that doctrine was adverted to; two of which were in this House. One of the two before this House, the case of *Ranger v. The Great Western Railway Company* (x), was a case of great notoriety. It was heard at great length in the time of Lord *Cottenham*, and his unfortunate death having rendered all those proceedings abortive, it came afterwards

(x) 5 H. L. Cas. 72. 86.

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to be heard again, when I had Great Seal, and it was again a The ground on which *Ranger* said, amongst other things, "I lent representations of the company for making a part of the line upon terms very disadvantageous upon which I would not have if I had not been so imposed enter into the contract for a part by being told that the engineer point out to me the line; and I so directed to point out the line me to suppose that the soil would be infinitely less expensive to excavate out to be." Upon the evidence appeared to me, weighing it full case wholly failed to be made been no such fraud at all. I went to advise your Lordships upon law, but I did then express myself as I still entertain, that if acting by an agent, induces a contract for the benefit of the company no more repudiate the fraudulent agent could repudiate him, and that the company is bound by the misrepresentation.

The next case that occurred to me in the argument, was a case of a similar nature. The Directors of *The Glasgow & South Western Railway Co. v. Glasgow & South Western Railway Co.* (*y*), raised the question, whether *Drew*, the Defendant, was indebted to the Plaintiff for 600 *l.*, which he, *Drew*, had borrowed from the Plaintiff.

(*y*) 2 Macq. (Sc. 1)



“ I am not so indebted to you at all, and whatever I did I was induced to do by your fraudulent misrepresentations, being (if they were fraudulent) misrepresentations of the directors by whom this National Exchange Company was managed.” When the case was heard here I was assisted by Lord *Brougham* and Lord *St. Leonards*, and I came to the conclusion (that was my own opinion only), upon an investigation of the case, that there was no loan at all ; that the money had been advanced by the directors out of the funds of the company, but not at all upon the terms of a loan, and that, consequently, there was sufficient to show that *Drew* had never been a borrower. But I added this, that the view of my noble and learned friends who heard the case at the same time with myself being, that that was a refined distinction not applicable in that case, and that there was a loan, but that it was void on account of the fraudulent mode in which the party had been induced to make that loan, I did not think that I should be doing justice if I were not to say that I adhered to the opinion that I expressed in the case of *Ranger v. The Great Western Railway Company*, and that if *Drew* had been induced to borrow the money by that which could be called a fraudulent representation on the part of those through whom the negotiation proceeded, namely, the directors, that was a fraud that would bind the company.

My Lords, to that opinion I entirely adhere, and I think it would have been applicable in this case if it had been proved that there had been a fraudulent representation or concealment by the directors, in order to induce Mr. *Conybeare* to purchase, not shares in the market (that is a very different thing), but shares belonging to the company, namely, forfeited shares, if the directors, or the secretary acting for them, had fraudu-

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the Respondent, in consequence of the mode in which the case has been presented by the Respondent's bill. He seeks to rescind a contract which he has entered into for the purchase of shares in a company, upon the ground of fraud and misrepresentation. It might be thought not very difficult to state a case of that description with clearness and precision; but instead of a simple statement of facts and circumstances, the bill presents to us a confused mixture of narrative and argument, in the midst of which it is very often extremely difficult to discover what is the exact misrepresentation upon which the Respondent means to rely. And he sums up the whole of his statement with this vague representation: he charges, "that the Defendants, other than the company, have both by letter and by word of mouth, admitted to each other and to other persons, the truth of the statements and charges in the Plaintiff's bill." When he does condescend to a little more particularity of statement, he leaves us in doubt whether he means to ascribe the misrepresentations to the secretary, or whether they are contained in the reports of the Directors.

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In dealing with these charges as presented, your Lordships must, in the first place, dismiss one which is stated in the bill, wherein the Respondent charges that the solicitors or secretary stated that the *A.* shares were entitled at all events to the 6 l. per centum preferential dividends out of the profits of the said company, because that statement if made at all, was made at a Board meeting held either in *December* 1858, or in *January* 1859 (for he does not tell us which), and that was after the time at which he purchased his shares; and therefore, undoubtedly, that must be entirely out of the case.

With respect to the only debateable ground, the question of the title to the lands, I find it extremely difficult



doubtful one, to communicate that to the Respondent. If the Appellants had withheld intentionally from the Respondent the Act of the 19 *Vict.*, upon which the doubt as to the title arises, then I think it would have been a very undue and improper concealment not to communicate to him the fact, that Mr. *Bullar* had given an opinion that the title was a doubtful one. And the omission of the 19th *Vict.* from the pamphlet given to the Respondent, and the concealment of the opinion of Mr. *Bullar*, taken together, might have made out against the Appellants a case of concealment. But it is quite clear that the circumstance of the delivery of that copy of the Acts, with the omission of the 19th *Vict.*, was not an intentional concealment. It is not imputed to the Appellants even by the Respondent himself in his bill, that they did intend to conceal that part of their title. It was impossible that they could have intended it. He must have known that there were other Acts; and, therefore, the question really comes to this, whether if the case is put, as it must be put, on the ground of concealment, it can be competent for the Respondent to complain that the Appellants deceived him, when he had not merely, as it appears to me, the means of knowledge in his power, but he must have had actual knowledge of the very circumstance to the omission of which he attributes his having been misled into this contract. Because, as was observed by my noble and learned friend on the woolsack, before the shares were given to the Respondent he must have read the articles of association, and the articles of association contained a recital of the whole of the title of the Appellants to these lands, including the omitted Act of the 19th *Vict.*, c. 69. It is impossible, as it appears to me, under these circumstances, that the Respondent can properly and justly complain that there has been an

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*St. Andrew's* and *Quebec* Railway Company depend upon four Acts of the Colonial Legislature of the 10th, 11th, 12th, and 19th of the Queen. Under the 10th *Vict.*, certain portions of Crown lands were to be granted for the railway track and depôts; what is called the belt of land for the construction of the railroad; and then it is provided, that if part of the railroad (that is the part between *St. Andrew's* and *Woodstock*) was not completed and in full operation within the space of 10 years, "all and every the grants of land and the rights and privileges conferred by this Act shall be utterly null and void, and the land and privileges shall revert to and revest in Her Majesty as fully as if no grant had been made." And then by the 4th section, for the encouragement of the undertaking it is enacted, "That on the completion of the said part of the contemplated railroad" (which means of course, the part between *St. Andrew's* and *Woodstock*) "it shall be lawful for the company, at their own proper costs and charges," (and so on), to choose and select 20,000 acres of land which are to be granted to them.

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There can be no doubt (and it is necessary to dwell a little upon this) that under this 10th *Vict.*, c. 84, these grants of the 20,000 acres of land were to be absolute and indefeasible grants; because they were not to be made until the railway was completed between *St. Andrew's* and *Woodstock*, and the other grants which were to become void were only to become void in the event of that part of the railroad not being completed.

Then under the 11 *Vict.* there are farther benefits granted with regard to allotments of land on each side of the line still to be made on the completion of the said part of the said contemplated railway, and which are clearly, therefore, to be absolute and indefeasible grants.

That was the state of things when the 12 *Vict.* was



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passed. The Appellants w of lands, which might be to complete the line within were absolute and indefeasible completion of the line. Then cites, that it is advisable should be given to the St. Company. How was that posed to be given? By receive grants of lands, not up way, but upon the expenditure upon the line, namely, 10, to receive 10,000 acres. An additional 10,000/. an additional. Observe, it was "for the undertaking." This grant grant which was to have been Acts, and which was only to of the line, but when made and indefeasible. And, that that this being substituted as at all events it would be as the former grant for which substitute it. It would be out money upon the line, in taking were told that they expenditure, conditional grant would be deprived, suppose line within the specified time.

That being the state of the of the Legislature upon which arise, was passed. It recites 12th Vict., that grants of recited Acts, or some of the



pany, and it enlarges the time for the completion of the railway to four years from the time of the Act coming into operation, when, if the line is not completed, "all and every the grants of land, and the rights and privileges conferred by" the several facility Acts, are to be "utterly null and void, and the land and privileges" to revert to the Crown. Then it recites the facility Act (as it is called) of the 12th of the Queen, enlarging the time for the completion of the railroad. And then, immediately following upon that, is the 7th section, upon which the doubt is said to arise. "The several grants and appropriations of Crown lands respectively made to or for the benefit of the company are by this Act confirmed, and shall be valid and effectual to all intents and purposes whatsoever." Now, it is quite clear, that that section can have no other reference than to the grants that were made under the 12th of the Queen.

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But then it may be said, Well, but if those grants were absolute and indefeasible, why should you require any section in this Act of the 19th *Vict.* to render them valid and effectual to all intents and purposes? I have no doubt at all that, without that section, those grants which had been previously made to the *St. Andrew's* and *Quebec* Railway Company would have been absolute and indefeasible grants. But it seemed to be thought that the general words of the second section annulling the grants if the line should not be completed within four years were sufficiently large to embrace those grants which had been made as an encouragement to the undertaking, and therefore this seventh section was introduced out of abundant caution to render those grants clearly valid and effectual to all intents and purposes. And some stress may be laid upon the expression that we find in the seventh section. The second section has described



of the Appellants, still his case must fail, because he cannot show that there has been any misrepresentation or improper concealment.

I only wish farther to say one word with regard to what has fallen from my noble and learned friend near me upon the subject of the decisions which have taken place as to representations made by directors or officers of a company binding the company. Upon the question how far the conversations which are said to have taken place at the interview between the Respondent and the secretary before he thought of taking these shares can be considered, under any circumstances, to be binding upon the Appellants so as to enable the Respondent, as against them, to rescind the contract, I do not think it at all necessary to express any opinion. But with regard to what my noble and learned friend has said, I think there will be found a very important distinction, which perhaps may reconcile all the cases between contracts which have been entered into with companies, through directors, for shares belonging to the company, and transactions which have been entered into by individual shareholders as between themselves and others. It may be that any fraud or misrepresentation on the part of directors, in dealing with shares in their company, may not make that company liable for the deceit and fraud of its agents, but yet may prevent it from deriving any benefit through holding to his contract any person who, through the fraudulent misrepresentations of the company's agents, has been induced to become the purchaser of shares. But important considerations will still arise where the misrepresentations are said to be contained in reports or balance sheets which, though intended for shareholders only, have been published to the world at large.

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**ACCOUNTS.** *See* SUCCESSION DUTY.

**ACQUIESCENCE.** *See* LIMITATIONS, STATUTE OF. RENEWABLE LEASES.

Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed :

Held, that no one of them could subsequently set up, in equity, claims adverse to the several characters they bore under such lease and the sub-lease.—*Archbold v. Scully*, 360.

It is not in the power of a tenant, by any act of his own, to alter the relation in which he stands to his landlord.—*Id. ib.*

**ACTION.** *See* DEFAMATION.

Though a case is of first impression if it shows a concurrence of loss, and damage from the act complained of, the action will be maintainable.—*Lynch v. Knight*, 577.

**ADVANCES.** *See* MORTGAGE. SHIP.

**AGREEMENT, MEMORANDUM OF.** *See* COMPANY. MORTGAGE. PRACTICE, 1.

One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statutes of Frauds; but where the first paper was in these words, "I agree to let the premises in *G. L.*, containing three stables, &c. for the same rent and subject to the same conditions that I hold them



3. An Order in Chancery made on petition constituting a guardian for an infant, makes that infant a ward of Court.—*Stuart v. Bute (Marquis)*, 440.
4. The *Lord Chancellor*, though "*Chancellor of Great Britain*," has only certain statutory powers in *Scotland*, which are not of a judicial nature.—*Id. ib.*
5. The 48 *Geo.* 3, c 151, s. 15, applies to judgments and orders in regular suits, and not to orders made with respect to the custody of infants. The latter kind of order may be made either on a bill or petition.—*Id. ib.*
6. *Semble*, that every order respecting the custody of an infant, whether granting or refusing the petition as to its custody, is to be treated as a final judgment, and therefore subject to appeal.—*Id. ib.*
7. *A.* was the son of a person who was at once a Peer of the *United Kingdom*, and a Peer of *Scotland*. *A.* was born in *September* 1847. *A.*'s father had estates in both countries, and resided at intervals in both. He died in *England*, in *March* 1848. *A.*'s mother was, in *May* 1848, appointed by the Court of Chancery his guardian, and *A.*'s uncle (the heir presumptive to the title) was appointed Tutor at Law in *Scotland*. This appointment gave him no right to the custody of the infant's person, but only conferred on him the management of the property till the infant should become 14 years of age. *A.*'s mother died in *Scotland* in *December* 1859. By the will of the mother, *S.* and *M.* were appointed guardians, and that appointment was confirmed by the Vice Chancellor, by whom a scheme for the infant's education was prepared and approved of. *A.* was then in *Scotland*, under the personal care of *M.* She promised to bring him to *England* to be educated, as *S.* proposed, in accordance with the scheme of the Court of Chancery. She brought him to *London*, but in consequence of disagreements between herself and *S.*, suddenly carried him back to *Scotland*. Proceedings in the Court of Session were instituted, to compel her to give up the custody of the infant to *S.*; but though the Court of Chancery had, on the application of *S.*, directed that he should be brought back to *England* to be educated, the Court of Session pronounced an interlocutor, postponing the case for nearly four months, and afterwards two other interlocutors interdicting anybody whatever from taking the infant, "a domi-



sufficient to warrant the Court to interfere with regard to such a contract.—*New Brunswick, &c., Company v. Conybeare*, 711.

*A.*, in *September* 1858, was desirous of purchasing shares in a company for making a colonial railway, and applied at its offices for information on the subject. The Secretary gave him certain reports issued by authority of the directors. In one of them was this passage, "The system of payment adopted in the province involves the liquidation of every claim once in six weeks ; so that when the certificate of the engineer, and the accounts forwarded by the manager are settled, the capital account is virtually closed up at that time." In fact the accounts were made up once in six weeks, but not discharged :

A report which had been made in 1857, stated that the income from traffic exceeded the expenditure. This report was also handed to him :

Several colonial Acts were passed, making grants of land to the company, all of which grants were to be dependent on the completion of the railway within a given time. One of the reports declared that the information given to the directors left them no doubt of completing the line within the time stipulated. The line, in fact, could not be, and was not completed within the time :

One of the Acts contained a direct divesting clause as to any grants of land if the railway should not be completed before a certain time :

The opinion of a barrister in *England* had been taken on this Act, and he stated, that the land in question was liable to forfeiture if the railway should not be completed within the time :

A bound-up copy of all the Acts was put into *A.*'s hands when he was making the inquiries, but he had not time to read them at the office. The various Acts, with the exception of the one which contained the divesting clause, were given to him to take away. He had the copy of the Act of Association, which recited fully every one of the Acts. He was not informed of the barrister's opinion. He afterwards became a shareholder in the belief, as he alleged, that the accounts were balanced, and paid every six weeks, and that the title to the land grants was indefeasible :

Held, affirming a decision of Vice Chancellor *Stuart*, and reversing a decision of the Lords Justices, that on these facts



tive of *C.* then asserted a claim to the whole property, and refused to pay the rent of 40*l.*, and *E.* did not take any steps to enforce its payment. In 1835, the representative of *C.* obtained a renewal of the lease of 1699. In 1854, he became party to a proceeding in the Incumbered Estates Court, and from what occurred there, *E.* became acquainted with facts which induced him, in 1856, to file a bill to have the grantee of the renewal lease declared a trustee for him as to one undivided fourth part of the estate comprised in that lease :

Held, that *E.* was entitled in equity to this relief, but considering his delay in enforcing his rights, the decree was ordered to be made without costs.—*Archbold v. Scully*, 360.

4. Where the autograph will of an illiterate man occasioned by the language used in it the difficulty of construction, the costs were ordered to come out of the estate.—*Hall v. Warren*, 420.
5. Costs in a suit where there had been conflicting claims of jurisdiction between the Court of Chancery and the Court of Session, were ordered to come out of the estate.—*Stuart v. Bute (Marquis)*, 440.
6. Costs of appeal ordered to be added to a mortgage security.—*Eyre v. McDowell*, 619.
7. Where parties charge fraud and fail upon that charge, the bill ought to be dismissed with costs.—*New Brunswick, &c., Company v. Conybeare*, 711.

COUNSEL. *See* PRACTICE, 8.

COURT OF SESSION. *See* CHANCERY. INFANT.

COVENANT. *See* SHIP.

The grantee, by deed of settlement on marriage, of an annuity charged upon certain lands, in which deed the grantor declares himself entitled in fee simple to the lands charged, may treat such declaration as a covenant ; and, on its afterwards appearing that the grantor had really only a life estate (there being no fraud), may proceed against his estate to obtain payment of the arrears of this annuity.—*Monypenny v. Monypenny*, 114.

*P. M.*, the uncle of a person about to marry, became a party to the marriage settlement, which recited that he proposed and agreed to secure to the intended wife, in case she should survive him, an annuity to be payable out of the manors mentioned in the settlement, “ of or to which he is seised or en-



visions of that statute, to give a priority to the decree over the equitable mortgage to *E.*—*Eyre v. McDowell*, 619.

A registered judgment under the provisions of the 3 & 4 *Vict.* c. 105 (Ir.), and the 13 & 14 *Vict.* c. 29 (Ir.), only affects such property as the debtor at the time of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and therefore does not displace the interest of a previous equitable mortgagee.—*Id. ib.*

*M'Auley v. Clarendon*, Dru. Cas. Temp. Nap. 433, approved of.—*Id. ib.*

In *Re Hamilton*, 9 Ir. Ch. Rep. (N.S.) 512, dissented from.—*Id. ib.*

DEEDS. See JUDGMENT. POWER. REGISTRY ACTS. SUCCESSION DUTY.

A deed reserving a power was executed in 1841. A deed exercising the power thus reserved was executed in 1850. These deeds, though executed at an interval of nine years from each other, must be treated as constituting but one disposition. *Braybrooke (Lord) v. The Attorney-General*, 150.

DEFAMATION.

*Qu.* whether a wife can maintain an action against a third person for words occasioning to her the loss of the *consortium* of the husband?

*Per Lord Campbell* (Lord Chancellor): She can.—*Lynch v. Knight*, 577.

If she can, the words must be such that from them the loss of the *consortium* follows as a natural and reasonable consequence. *Dub. Lord Wensleydale.*—*Id. ib.*

Where therefore a wife (her husband being joined for conformity as a Plaintiff) brought an action to recover damages from *A.* for slander uttered by him to her husband, imputing to her that she had been almost seduced by *B.* before her marriage, and that her husband ought not to let *B.* visit at his house, and the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house and return to her father, whereby she lost the *consortium* of her husband:

Held, that the cause of complaint thus set forth would not sustain the action, for that the alleged ground of special da-



tive of *C.* then asserted a claim to the whole property, and refused to pay the rent of 40*l.*, and *E.* did not take any steps to enforce its payment. In 1835, the representative of *C.* obtained a renewal of the lease of 1699. In 1854, he became party to a proceeding in the Incumbered Estates Court, and from what occurred there, *E.* became acquainted with facts which induced him, in 1856, to file a bill to have the grantee of the renewal lease declared a trustee for him as to one undivided fourth part of the estate comprised in that lease :

Held, that *E.* was entitled in equity to this relief, but considering his delay in enforcing his rights, the decree was ordered to be made without costs.—*Archbold v. Scully*, 360.

4. Where the autograph will of an illiterate man occasioned by the language used in it the difficulty of construction, the costs were ordered to come out of the estate.—*Hall v. Warren*, 420.
5. Costs in a suit where there had been conflicting claims of jurisdiction between the Court of Chancery and the Court of Session, were ordered to come out of the estate.—*Stuart v. Bute (Marquis)*, 440.
6. Costs of appeal ordered to be added to a mortgage security.—*Eyre v. McDowell*, 619.
7. Where parties charge fraud and fail upon that charge, the bill ought to be dismissed with costs.—*New Brunswick, &c., Company v. Conybeare*, 711.

COUNSEL. See PRACTICE, 8.

COURT OF SESSION. See CHANCERY. INFANT.

COVENANT. See SHIP.

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Held, that the cause of complaint thus set forth would not sustain the action, for that the alleged ground of special da-



ELECTION. *See* PRACTICE, 8. RENT-CHARGE.

EQUITABLE MORTGAGE. *See* MORTGAGE. REGISTRATION OF DEEDS.

ERROR. *See* PRACTICE, 1.

EVIDENCE.

The rule of evidence in pedigree cases has not been relaxed of late years.—*Attorney-General v. Köhler*, 654.

EXCHEQUER CHAMBER. *See* PRACTICE, 1.

FAMILY ARRANGEMENT. *See* WILL, 3.

FOREIGN JURISDICTION. *See* CHANCERY.

FOREIGN LAW. *See* MARRIAGE.

FORFEITURE. *See* COPYHOLD CUSTOM. RENEWABLE LEASES.

FRAUD. *See* COMPANY. MORTGAGE, 3.

FRAUDS, STATUTE OF. *See* AGREEMENT. POWER, 4. PRACTICE.

FREIGHT. *See* SHIP.

GIFT OVER. *See* WILL, 7, 8.

“GOD’S LAW.” *See* MARRIAGE.

GOODS. *See* PLEADING. RAILWAY.

GUARANTIE. *See* MORTGAGE.

GUARDIAN. *See* CHANCERY. INFANT. WARD OF COURT.

HEADINGS OF CLAUSES.

The Lands Clauses Consolidation Act, 1845, is divided into different subjects by headings, which are accompanied by corresponding words in the margin. Thus there is a division marked in the margin by the words “Intersected lands.” In the body of the statute is a line containing these words as a heading: “And with respect to small portions of intersected land, be it enacted, as follows.” Then come two sections, the first of which (the 93d) begins thus: “If any lands not being situate in a town,” &c. The second of the two sections (the 94th) begins, “If any *such* land shall be so cut through and divided:” &c.

Held, that the word *such* in the 94th section is not confined to “lands not being situate in a town,” as described in the 93d section, but applies to the words in the general heading, “small



the principal to the next of kin, and the claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay principal.—*The Attorney-General v. Köhler*, 654.

4. *A.*, a Defendant, as administrator on the nomination of the Crown, in a suit by the alleged next of kin, died; *B.*, his successor in office, took out letters *de bonis non*. A bill to revive the suit was filed, and an order made thereon recited the prayer of the bill thus: "that the said suit and proceedings, which had so become abated as aforesaid, might be revived, and be in the same plight and condition against *B.* as they were at the time of the death of *A.*, and that the Plaintiffs might have the same relief against *B.* as they would have been entitled to and had against *A.* had he still been living," and then added, "which is hereby Ordered by the Court as prayed:"

Held, that this Order did not of itself create any liability in *B.*, but merely put the suit in the same state as it had been in before *A.*'s death.—*Id. ib.*

5. No costs were given.—*Id. ib.*

JOINT TENANCY. *See* WILL, 1, 2.

JUDGMENTS. *See* DECREES. REGISTRY OF DEEDS.

JURISDICTION. *See* CHANCERY.

LANDLORD AND TENANT.

Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed:

Held, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease.—*Archbold v. Scully*, 360.

It is not in the power of a tenant, by any act of his own, to alter the relation in which he stands to his landlord.—*Id. ib.*

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 42d section of 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years.—*Archbold v. Scully*, 360.



## LUNACY JURISDICTION.

*Qu.* Whether the words "the Court of Chancery," in the 5th section of the 18 & 19 *Vict.*, c. cxlix (the *Stockton and Darlington* Railway Act), apply exclusively to *The Lord Chancellor* or to *The Lords Justices* sitting in Lunacy?—*Stockton, &c., Railway v. Brown*, 246.

## MARRIAGE.

1. Delay in instituting a suit, for nullity of marriage on the ground of impotence, is not an absolute bar to the suit, but renders it necessary that the evidence to support the suit should be of the clearest and most satisfactory kind.—*Castleden v. Castleden*, 186.
2. Where, therefore, a woman who had married in 1834, lived with her husband till 1838, then separated from him, in 1853 caused him to be sued for her debts, obtained from him an allowance, which was continued till *October* 1858, and in *November* 1858 instituted a suit for nullity of marriage on the ground of incompetence, it was held, that she was bound to give unequivocal proof of the truth of the allegation in the petition, and the Lords not being satisfied that the evidence was of that character, the decree of the Court below dismissing the petition, was confirmed.—*Id. ib.*
3. The forms of entering into the contract of marriage are regulated by the *lex loci contractus*, the essentials of the contract depend upon the *lex domicilii*. If the latter are contrary to the law of the domicile, the marriage (though duly solemnized elsewhere) is there void.—*Brook v. Brook*, 193.
4. The Marriage Act, 26 *Geo.* 2, c. 33, only applies to the forms of certain marriages celebrated in this country; it does not touch the essentials of the contract. It is, therefore, only territorial.—*Id. ib.*
5. The 5 & 6 *Will.* 4, c. 54, affects all domiciled English subjects wherever they may be transiently resident. It does not affect them when actually domiciled in British Colonies acquired by conquest where a different law exists.—*Id. ib.*
6. The marriage of a man with the sister of his deceased wife is declared by the 28 *Hen.* 8, c. 7, to be contrary to God's law; and though that statute itself is repealed, its declarations are renewed in the 28 *Hen.* 8, c. 16, and 32 *Hen.* 8, c. 38, which are in force.—*Id. ib.*



He worked the mines in such a manner (without actual negligence) that the lands of *B.*, *C.*, and *D.* sank in ; and after more than six years' interval their sinking occasioned an injury to the houses of *A.* :

Held, that a right of action accrued to *A.* when this injury actually occurred, and that his right was not barred by the Statute of Limitations.—*Backhouse v. Bonomi*, 503.

MORTGAGE. *See* COSTS. DECREES. PLEADING, 2. REGISTRY ACTS.

1. A first mortgagee, whose mortgage is taken to cover what is then due and also future advances (within a fixed amount), cannot claim the benefit of such advances in priority over a second mortgagee, of whose mortgage he had notice at the time of its execution, and before he made these new advances. *Diss.* Lord *Cranworth*.—*Hopkinson v. Rolt*, 514.
  2. The case of *Gordon v. Graham*, as reported 2 Eq. Cas. Abr. 598, pl. 16; 27 Ven. Abr. 52, pl. 3, discussed and overruled.—*Id. ib.*
  3. *John S.* entered into an agreement with *E.* for securing payment of sums of money owing by him to *E.* In this agreement there was a covenant (amongst others) that *John S.* would give to *E.*, as part of the securities, a mortgage on the lots of a particular estate, and *James S.*, the brother of *John S.*, therein described as being the owner of Lot No. 1, was to join in the mortgage of it. By a subsequent agreement, under seal, to which *John S.*, *E.*, and *James S.* were parties, after reciting the first agreement, *John S.* covenanted that he would, before a certain time, convey, or cause to be conveyed, to *E.*, Lot 1, to be held by *E.* in fee: "And it is hereby agreed by and between the parties hereto," that if *John S.* shall pay *E.* the monies due to him, *E.* shall re-transfer "all securities of whatever nature or kind." Provided, that if payment shall not be made, *E.* may by "entry, foreclosure, sale, or mortgage of any part or parts of the said lands," &c. levy the deficiency. "And each of them, *John S.* and *James S.*, for himself, his executors," &c., covenanted to pay any deficiency, so that out of the interest or dividends on railway shares (previously deposited), or by cash payments of *John S.* or *James S.*, there should be received a certain sum every year. All the three parties duly executed this agreement :
- Held, that this amounted to an equitable mortgage binding on the estate of *James S.*—*Eyre v. McDowell*, 619.



3. A declaration or plaint alleged that *A.*, at the request of *B.*, a common carrier on a railway, became a passenger by the said railway, and paid his fare in that behalf; that *C.* was a servant of *B.*, and as such servant required *A.* to deliver to him, *C.*, a case which *A.* was then carrying with him, in order that the same might be carried in a certain compartment of the train; That *A.* delivered to *C.* the said case to be safely carried, and to be re-delivered at the end of the journey, and then averred the duty of *B.*, as a common carrier, and *A.*'s own performance of all the conditions precedent to the discharge of that duty by *B.*, and that the case was not re-delivered, whereby, &c. The Defendant pleaded that *A.* had notice of the rule on the said railway, that passengers and their personal luggage were carried at one rate, and merchandise carried at another rate of payment; and that payment was required for all merchandise carried on the railway; that the Plaintiff took the case with him as personal luggage, and did not pay for the same as merchandise, and that the case contained merchandise, of which Defendant had not notice. The Plaintiff replied that the case was, in appearance and fact, fit and proper for the conveyance of merchandise and not luggage, and did contain merchandise; that there was no improper concealment on his part, and that the Defendant received the same as personal luggage, and without making objection thereto, and without demanding extra remuneration:

Held that, even supposing that the declaration showed a good cause of action by reason of a contract between *A.* and *B.* through *C.* the servant, still the plea was an answer to it, and that the effect of the plea was not got rid of by the replication, which was clearly bad, for not averring, in any way, that the Defendants had notice or knowledge that the case contained merchandise.—*Belfast, &c., Railway Companies v. Keys*, 556.

4. Where a wife (her husband being joined for conformity as a Plaintiff) brought an action to recover damages from *A.* for slander uttered by him to her husband, imputing to her that she had almost been seduced by *B.* before her marriage, and that her husband ought not to let *B.* visit at his house, and the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house and return to her father, whereby she lost the *consortium* of her husband:

Held, that the cause of complaint thus set forth would not sus-



PRACTICE. *See* CHANCERY. COSTS. DECREES. REGISTRY ACTS.  
REVIVAL OF SUIT. WILL.

1. In the Court of Queen's Bench, in an action on an agreement, the questions discussed were—one of fact—what the parties had said and written to each other—and one of law—what was the construction to be put on two letters of the Defendant, which were relied on as a ratification of what his agent had done. In the Exchequer Chamber (upon the proceeding by appeal under the Common Law Procedure Act), the judgment of the Court was given on the ground that even if the Defendant's letters amounted to a ratification, it was null, for that the paper ratified did not contain a memorandum of agreement sufficient to satisfy the Statute of Frauds :

Held, that it was competent to the Court of Exchequer Chamber to adopt that ground for its judgment.—*Fitemaurice v. Bayley*, 78.

2. The Appellant's counsel appeared and announced that he could not distinguish his case from one which had been recently decided, and therefore submitted to an affirmance. The appeal was dismissed with costs.—*Monypenny v. Dering*, 149, *n*.

3. In an information in the nature of *quo warranto*, there was, after issue joined, a suggestion entered on the record "that the trial of the issue may be more conveniently had" in *M*. than in *L*. The Defendant appeared at the trial in *M* :

Held, that for the purpose of securing a fair trial, the Court has an inherent power to change the venue ; that if this form of suggestion was insufficient, it should have been demurred to ; that the Defendant had here waived all objection to it by appearing at the trial, and that it was no ground of error.—*Clerk v. The Queen*, 184.

4. Where an Appellant does not appear to support his appeal, it may, on the application of the Respondent, be dismissed, with costs.—*Smith v. Durrant*, 192.

5. The *Vice Chancellor* made a decree which was afterwards varied by the *Lords Justices*. This House restored the decree of the *Vice Chancellor*, and farther proceedings being necessary, remitted the cause to him, to proceed with it in the same state in which it was when brought by appeal before the *Lords Justices*.—*Stockton Railway Company v. Brown*, 246.



tween him and the company, and therefore on its being lost he was not entitled to recover the value of it from the company.—*Belfast, &c., Railway Companies v. Keys*, 556.

3. A declaration, or plaint, alleged that *A.*, at the request of *B.*, a common carrier on a railway, became a passenger by the said railway, and paid his fare in that behalf; that *C.* was a servant of *B.*, and as such servant required *A.* to deliver to him, *C.*, a case which *A.* was then carrying with him, in order that the same might be carried in a certain compartment of the train; that *A.* delivered to *C.* the said case to be safely carried, and to be re-delivered at the end of the journey, then averred the duty of *B.*, as a common carrier, and *A.*'s own performance of all the conditions precedent to the discharge of that duty by *B.*, and that the case was not re-delivered, whereby, &c. The Defendant *B.* pleaded that *A.* had notice of the rule on the said railway, that passengers and their personal luggage were carried at one rate, and merchandise carried at another rate of payment; and that payment was required for all merchandise carried on the railway; that the Plaintiff *A.* took the case with him as personal luggage, and did not pay for the same as merchandise, and that the case contained merchandise, of which the Defendant had not notice. The Plaintiff replied that the case was, in appearance and fact, fit and proper for the conveyance of merchandise, not luggage, and did contain merchandise; that there was no improper concealment on his part, and that the Defendant received the same as personal luggage, and without making objection thereto, and without demanding extra remuneration :

Held, that even supposing that the declaration showed a good cause of action by reason of a contract between *A.* and *B.* through *C.* the servant, still the plea was an answer to it, and that the effect of the plea was not got rid of by the replication which was clearly bad, for not averring, in any way, that the Defendant had notice or knowledge that the case contained merchandise.—*Belfast, &c., Railway Companies v. Keys*, 556.

#### REGISTRY ACTS.

*John S.* entered into an agreement with *E.* for securing payment of sums of money owing by him to *E.* In this agreement there was a covenant (amongst others) that *John S.* would give to *E.*, as part of the securities, a mortgage on the



**RENEWABLE LEASES. See LIMITATIONS, STATUTES OF.**

*A.* in 1699 granted to *B.* a lease for lives, renewable for ever. This lease, by the death of *B.* intestate, vested in his four daughters. The interest of three of them became, in 1778, vested in *C.*, who got possession of the whole of the property; but upon *D.*, who claimed one undivided fourth part, filing a bill in Chancery against *C.*, he, in 1779, agreed to accept, and *D.* consented to grant him, a lease of that undivided fourth part for 999 years, at an annual rent of 40 *l.* The lives in the original lease dropped in 1784, but all the parties went on for years acting upon its terms. Up to 1828 the rent on the lease of 1779 had been duly paid. *D.* died, having first devised her interest in that lease to *E.* The representative of *C.* then asserted a claim to the whole property, and refused to pay the rent of 40 *l.*, and *E.* did not take any steps to enforce its payment. In 1835, the representative of *C.* obtained a renewal of the lease of 1699. In 1854, he became party to a proceeding in the Incumbered Estates Court, and from what occurred there, *E.* became acquainted with facts which induced him, in 1856, to file a bill to have the grantee of the renewal lease declared a trustee for him as to one undivided fourth part of the estate comprised in that lease :

Held, that *E.* was entitled in equity to this relief, notwithstanding the lapse of time and his own non-enforcement of payment of rent, but he was required to grant a renewal of the lease of the fourth part for the residue of the term of 999 years.—*Archbold v. Scully*, 360.

Considering the delay of *E.* in enforcing his rights, the decree was ordered to be made without costs.—*Id. ib.*

**RENT-CHARGE. See COVENANT.**

*A.* granted an annuity, to commence after his death, and which he charged on certain lands, to which lands he declared himself entitled in fee simple, and over them he gave a right of distress in respect of the annuity. It afterwards appeared that as to the greater part of these lands he was only entitled to a life estate. After the discovery of the defect in the grantor's title, a small part of the lands charged (of which part the grantor had been seised in fee) was sold, the grantee of the annuity received the purchase money in part discharge of the arrears :



for the husband, and as to the other moiety for the children, at such ages, &c., as the wife, notwithstanding her coverture, should appoint, and in default of appointment, among the children, as tenants in common, to be vested at twenty-one, or marriage; and if there should be no child, as to the whole, for the husband for life; and after his decease for any person *M. F.*, notwithstanding her intended or any future coverture, might appoint; and in default of appointment, "for the person or persons, who at the decease of *M. F.*, should be of her blood and in kin to her, and who, in their own right, or in right of their representatives, would have been entitled to the same under the Statutes for Distribution, in case the said *M. F.* had died possessed thereof *intestate and unmarried*." The wife died with her first child, which survived her only one day. She had not exercised the power of appointment:

Held, that "unmarried" in this settlement meant being without a husband at the time of death, that consequently the fund went to the child, as the wife's next of kin, and on its death passed to its father.—*Clarke v. Colls*, 601.

SHARES IN A COMPANY. *See* COMPANY.

SHIP.

A master of a ship has no lien on the ship or freight for wages, or for any expenditure he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal and agent, where he makes a special contract, in itself *ultra vires*, in order to fulfil which, he incurs special expenses: if the owner adopts the benefit of that contract, he must, in equity, also bear its burthens. Where, therefore, the master of an ordinary seeking ship entered into a charter-party, under seal, to carry troops from the *Mauritius* to *England*, and stipulated, on his own responsibility, in the charter-party, that he would make certain alterations in the ship. in order to enable him to carry the troops, and at the *Cape of Good Hope* entered into another charter-party, not under seal, to a similar effect, and made the specified alterations, and paid money, and drew bills to meet the expenses necessary to the making of these alterations, and the voyage was performed:

Held, that in Equity, the master was first entitled out of the freight earned under these charter-parties to be repaid the



- 3 & 4 *Vict.* c. 105. }  
 13 & 14 *Vict.* c. 29. } *Eyre v. McDowell*, 619.  
 15 & 16 *Vict.* c. 3. *The Attorney-General v. Köhler*, 654.  
 Colonial Railway Acts. *New Brunswick Railway, &c., Companies v. Conybeare*, 711.

STATUTE OF FRAUDS. *See* AGREEMENT. POWER, 4. PRACTICE, 1.

STATUTE OF LIMITATIONS. *See* WILL, 4, 5.

#### SUCCESSION DUTY.

1. The Succession Duty Act is not to be construed according to the technicalities of the Law of England or Scotland, but according to the popular use of the language employed.—*Braybrooke (Lord) v. The Attorney-General*, 150.
2. A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, and resettling the estate in his own favour. The person from whom he derives the estate is his “predecessor.”
3. Devise in 1796 of certain freehold estates to *A.* for life, remainder to his eldest son *B.* for life, remainder to the first and other sons of *B.* in tail male. In 1841, *A.* being then tenant for life in possession, *A.* & *B.* executed a disentailing deed, to which two other persons were parties as trustees, and granted to the trustees, to hold, subject to the life estate of *A.*, to such uses as *A.* and *B.* should appoint, and in default, if *B.* should survive, to such uses as he should appoint, and in default to *B.* for life, and to his first and other sons in tail male. In 1850, by another deed which recited the former, and by which *A.* brought new estates into settlement, and discharged all the estates from a charge of 10,000 *l.*, and *B.* gave up advantages to which he was entitled, an annuity to *B.* during the life of *A.* was charged upon all the premises, and subject thereto, they were appointed to *A.* for life, remainder to *B.* for life, remainder to the use of his first and other sons in tail male :

Held, affirming the judgment of the Court below, that these deeds must be taken as having been executed on the same day, that they constituted (*diss.* Lord *Wensleydale*) within the 12th section of the 16 & 17 *Vict.* c. 51, a disposition made by *B.* in favour of himself, and made out of the estate to which he was entitled to under the will of 1796, that consequently his “succession” must be treated as happening under that will, and he was liable thereupon to the amount of



Held, that *G.*'s succession was liable to a payment of 3*l.* per cent., his predecessor having been *W. J.* That *E. G.* took under his own disposition, on a succession likewise derived from *W. J.*, and was liable to a duty of 3*l.* per cent., and that *G.*'s younger children were also (as to some part of their interests) liable to a duty of 3*l.* per cent., as deriving their succession from their brother, *E. G.* But as to certain estates newly bought into settlement by their grandfather *H.*, they were held liable to a duty of only 1*l.* per cent., and the account of the whole duty due from them was directed to be taken with reference to this allowance.—*The Attorney-General v. Floyer*, 477.

7. In taking the account of what was due from *E. G.* allowance was ordered to be made for the annuity of 800*l.* charged upon the estates, the subject of his succession.—*Id. ib.*
8. *A.*, being seised of certain estates in fee simple by a marriage settlement executed in 1812, conveyed them to the use of himself for life, remainder to the use of his sons in tail successively. *A.* had three sons, *E.*, *R. P.*, and *C. F.* In 1840 *A.* and his eldest son *E.* executed a disentailing deed, and conveyed the estates to such uses as they should appoint, and, in default, to the uses of the settlement of 1812. In the same year *A.* and *E.*, on the intended marriage of *E.*, appointed to the use of *A.* for life, remainder to *E.* for life, remainder (subject to certain provisions for the intended wife and the younger children) to the first and other sons of the marriage successively in tail male, remainder to *R. P.* and *C. F.* successively in tail male. *E.* died in his father's lifetime, without issue. *A.* and *R. P.* then conveyed the estates to such uses as they should appoint, and in default to the existing uses. They afterwards appointed to *A.* for life, remainder to *R. P.* for life, remainder to his first and other sons in tail male, with an ultimate remainder to *A.* and his heirs. *R. P.* died without issue. *A.* then died, and *C. F.* succeeded to the estate :

Held, that *C. F.* was liable to a duty of 3*l.* per cent. as on a succession derived from his elder brother.—*The Attorney-General v. Smythe*, 497.

SUPPORT. See MINES.

TENANT. See RENEWAL OF LEASES.

It is not in the power of a tenant, by any act of his own, to



3. During the life of the son, and till the time of filing the bill, which was 24 years after his death, all the members of the family had believed, and had done many acts on the belief (not the result of legal discussion, but a mere family assumption) that the son was not entitled to a share of the residue as one of the next of kin, but that his title to the property expired with his life estate :

Held, that this was not such an acquiescence in a family arrangement as prevented the son's personal representatives from enforcing their claim.—*Bullock v. Downes*, 1.

4. Held also, that the length of time was not a bar under the Statute of Limitations, for that the will created a trust.—*Id. ib.*

5. *Seemle*, the 40th Section of 3 & 4 Will. 4, c. 27, applies to legacies charged on land.—*Id. ib.*

6. In construing the autograph will of an illiterate man, the usual meaning of technical language may be disregarded, but no word which has a clear and a definite operation can be struck out.—*Hall v. Warren*, 420.

7. A testator gave all his real and personal estate to his executors : then mentioned a specific house, 71, *Queen's Road, Bayswater*, which he gave to the inhabitants of *B.*, to found a charity, directed the executors to call a meeting of the inhabitants, to appoint trustees to carry his scheme into execution, named his godson, *W. H. W.*, to be one of the trustees, leaving to the inhabitants to choose as many more as they pleased ; and then said, in the event of the inhabitants not being willing to carry out the scheme, " I will that all my *said* property so given to said charity shall absolutely belong to my said godson, *W. H. W.*" He afterwards made some pecuniary gifts, and devised leasehold and freehold houses for life to different persons ; each house on the death of the devisee, being given to the " residuary legatee or legatees " for the charity. As to one freehold house alone, 4, *Douglas-place*, there was a gift of it to *W. H. W.* for life, then to the trustees of the charity ; but should there be no charity established, then to *W. H. W.* absolutely. The gifts to the charity being contrary to the Statute of Mortmain, no meeting of inhabitants was called, nor were any trustees appointed :

Held (*Dub.* Lord *Wensleydale*), affirming the decree of Vice-Chancellor *Wood*, that on the general failure of the gift to the charity, the gift over took effect ; and therefore, in the case











